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No. 11642

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT
see rule 2476

REFRIGERATION ENGINEERING, INC., a corporation,

Appellant,

vs.

YORK CORPORATION, a corporation,

Appellee.

and

YORK CORPORATION, a corporation,

Appellant,

vs.

REFRIGERATION ENGINEERING, INC., a corporation,

Appellee.

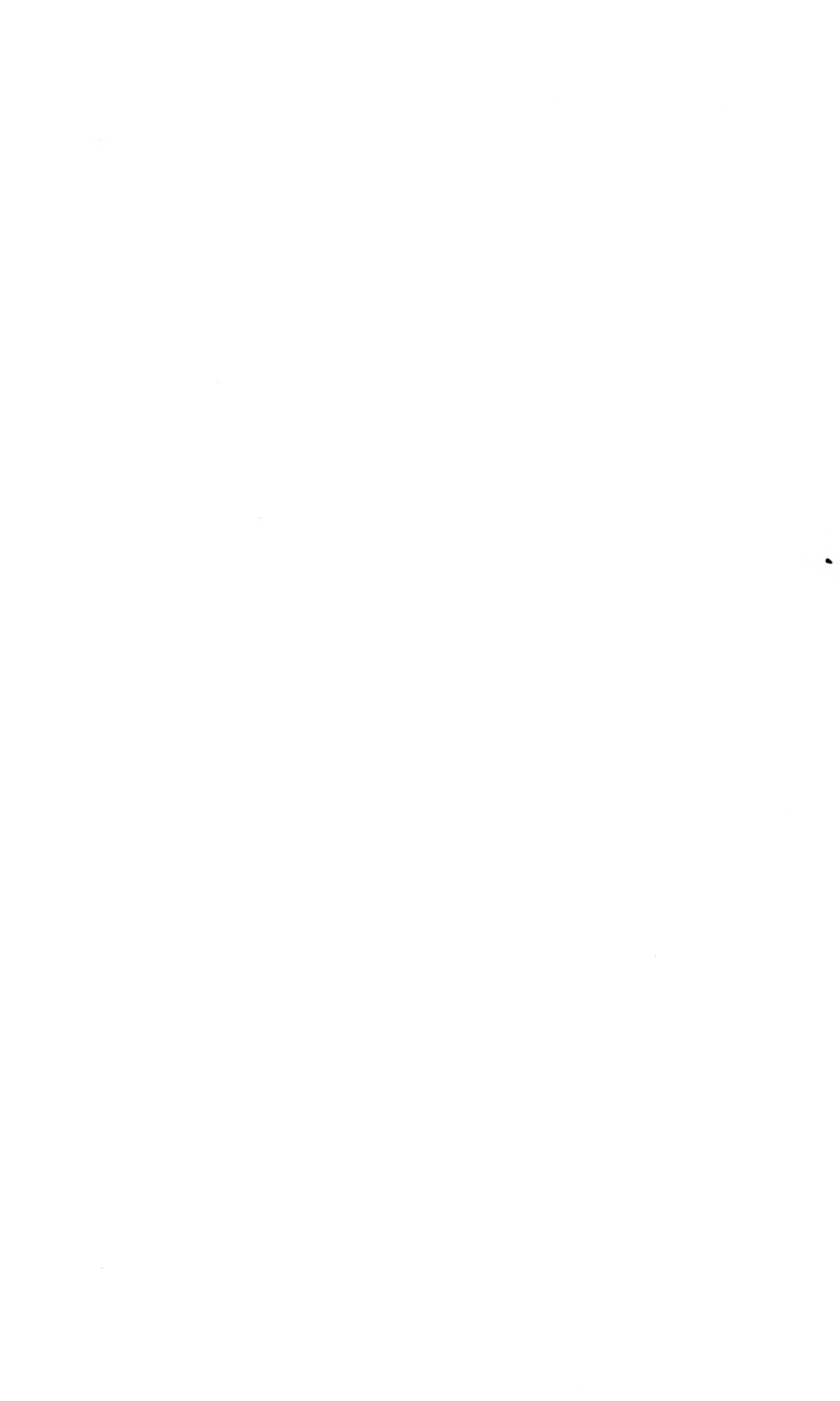
TRANSCRIPT OF RECORD

(In Four Volumes)

VOLUME III

(Pages 753 to 1116, Inclusive)

Upon Appeals from the District Court of the United States
for the Southern District of California,
Central Division



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(Deposition of Fred L. Trullinger)

Q13. You referred to a locker plant at Yamhill. Will you please tell us about the starting or inception of that locker plant.

A. Well, originally we learned of the locker plants that were installed here in Oregon and in Washington, particularly at Seattle. I came from Seattle down here. And it appeared to be a good business, and it had a drawing—bringing people into our store, gave us a clientele that came in all the time, so we established this locker plant in our store building at Yamhill.

Q14. Do you recall when you established the locker plant?

A. Well, we used the back room or the warehouse part of the store. We did not build a new building. We just incorporated it right in the old building.

Q16. What did you do in the way of building construction to convert the warehouse into the locker plant?

A. Well, we insulated it by putting cork on the floor six inches thick, with concrete on top two inches. That is [962] just on the floor of the warehouse. We first laid down paper, two layers of paper, followed with this cork laid in asphaltum, and then two inches of concrete on top of that. And on top of that floor we built the box, the insulated box, which is, I think, eight or ten—it possibly is ten inches in the clear inside, which we filled with Palco bark or Redwood bark ground up. The trade name is "Palco."

Q17. How many rooms were devoted to the locker?

A. Well, two rooms. One was what we called the pre-cooling room, and then the locker plant itself inside, where the people had their lockers.

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Q18. Is the pre-cooling room sometimes referred to also as the chill room?

A. Yes, that is one of the names.

Q19. And were the two rooms adjacent, separated by a single wall? A. They were.

Q20. By whom was the construction of the locker and pre-cooler rooms made?

A. You mean the people that worked at the job?

Q21. No. Who had the work done? Yourself?

A. We had the work done, yes, I and Eustice. I paid for it—I incorporated the whole thing myself, but he was there on the job. I was here in Portland and only out there at times. [963]

Q22. Can you describe the construction of the side walls of the locker and pre-cooler rooms?

A. We first put up two by fours alongside the brick wall, and then put on shiplap, and then two layers of paper, one over the other, to make a tight wall, and then sealed that outside of this paper with flooring, tongue and groove flooring, nailed up tight. That is for the outside wall. Then we set up another wall ten inches farther in the room, just in the room like these two walls here (indicating). This wall here was built just the same only it had the two by fours set up this way, and the wall on this side with the space between. Then as we built this up, this space between was filled with the insulating material which we used, which was redwood bark.

Q23. The side walls of the pre-cooling and locker rooms, then, were all insulated?

A. They were all insulated just alike.

Q24. I show you a file of papers, the first of which purports to be a letter under the letterhead of Electrical

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Products Consolidated, dated September 26, 1935, addressed to Mr. Fred L. Trullinger, Portland Seed Company, Portland, Oregon, Re Yamhill Locker Equipment. This letter is signed on the second page, "Electrical Products Consolidated," and underneath "C. W. Hulse." Can you identify this letter, Mr. Trullinger?

A. Yes. [964]

Q25. Will you do so.

A. This was the letter for the proposal covering the installation of the machinery in the locker plant.

Q26. The Yamhill locker plant?

A. The Yamhill locker plant; yes, sir.

Q27. Do you know by whom the letter and proposal was made?

A. It was made by the Electrical Products, I presume, and it was signed by Mr. C. W. Hulse.

Q28. Do you know Mr. C. W. Hulse?

A. Very well.

Q29. What was his business on September 26, 1936, if you know?

A. Well, I understood that he was a salesman for this Electrical Products Consolidated Company, and he came and sold me the idea of putting in this Brunswick, or Carrier-Brunswick. There were many salesmen came to see me to sell, but he sold me the idea of using their particular machines, and I presume that he was the salesman.

Q30. Do you recall having received a letter corresponding to the one before you on or shortly after September 26, 1936? A. I do, yes.

Q31. The letter which you have appears to be a copy of an original. Have you investigated your files to ascertain—

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* * * * *

Q32. Mr. Trullinger, have you any other letters like this [965] one in your files?

A. I don't believe I have now. I haven't located any.

Q33. You have searched?

A. I have searched. That is a long time ago, and the files are not kept very good. I don't remember finding one just like this. It might be if I would search far enough, but I just didn't take the time to look.

Mr. White: Will the reporter mark the letter to which we have referred as Plaintiff's Exhibit Y-1.

(The copy of the letter referred to was marked Plaintiff's Exhibit Y-1 for identification.)

By Mr. White:

Q34. Mr. Trullinger, will you endeavor to locate a duplicate original or otherwise of this letter when you have time?

A. Yes. I will. I may have it in the files but, you know, I have had thousands and thousands of letters since this one.

Q35. If you are able to locate it will you notify me?

A. I will do that, yes.

Q36. The next paper in the file is headed "Electrical Products Consolidated, Carrier Order Transmittal." What significance do the words and figures on this sheet have to you?

Mr. White: Counsel, for the purpose of this witness' testimony, I will skip this document, so for the time being I will ask that it be identified as Plaintiff's Exhibit Y-2 for [966] identification.

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(The document referred to was marked Plaintiff's Exhibit Y-2 for identification.)

Q38. The next document is captioned "Electrical Products Consolidated," and beneath that "Carrier," and beneath the word "Carrier," "Refrigeration-Air Conditioning," and the title of the paper appears to be "Order." At the lower right-hand part of this sheet appears the written name "F. L. Trullinger." Can you identify the signature?

* * * * *

Q39. Can you identify this document, Mr. Trullinger?

A. I can identify it, yes.

Q40. Will you do so, please. A. I identify it.

Q41. What is it? A. This one?

Q42. Yes. A. This is Carrier Order—

Mr. Lyon: Note that the witness is reading from the document.

Mr. White: Proceed.

The Witness: —dated September 25, 1936. You want me to read on?

Q43. No. Merely tell me if you know what the document is. [967]

A. Well, it is a contract that I signed with them.

Q44. With whom?

A. With the Electrical Products people.

Q45. Is that your signature to the contract?

A. Yes, this is my signature.

Q46. That is your original signature?

A. Well, apparently it is original. If it is a copy, it is a very good one. I believe it is the original.

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Q47. Appearing also on this document is a signature appearing to be "C W. Hulse."

A. I know Mr. Hulse, but I don't know that signature because I don't know Mr. Hulse's writing. He may have written it there; probably did at the time, but I couldn't say.

Q48. The Mr. Hulse to whom you now refer is the Mr. Hulse whom you mentioned earlier? A. Yes.

Q49. This document contains, among other statements, the following: "The following described property situated in the City of Yamhill, County of Yamhill, State of Oregon, to wit: Equipment as per attached proposal installed at S. W. corner of Main & Maple Streets, Lot 2, Block 12, City of Yamhill, Yamhill County, Oregon." Do you know what property is identified by that lot description?

A. Yes, that is the property on which the store stands.

Q50. At Yamhill? [968] A. At Yamhill, yes.

Q51. Do you know to what the words "attached proposal" refer?

A. Well, this is attached to the other proposal which he made in writing, and it was along with the proposal that the company made to us.

Q52. Plaintiff's Exhibit Y-1?

A. Y-1; that is right.

Q53. On the reverse side of this same document I read the statement: "Terms, \$850.00 down: Balance \$850.00 to be paid thirty days after completion of installation." Below this statement I see a signature which appears to read "C. W. Hulse." To what do the stated terms refer?

Mr. Lyon: That is objected to on the ground that there is no proper foundation for the question. The document speaks for itself.

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The Court: Overruled.

By Mr. White:

Q54. This document, as I recall your statement, has been identified by you as a contract entered into with Electrical Products. A. It is.

Q55. You personally entered into that contract, did you? A. I did.

Q56. Will you now identify the expression following [969] "Terms" on the reverse side of the contract?

A. The terms here are \$850.00 down and the balance to be paid in thirty days after the completion of installation. That was understood at the time, and that was the way it was carried out, with this change: That we did not pay the second \$850.00 because the installation was not satisfactory.

Q57. I will come to that later.

A. All right. [970]

Q58. In Exhibit Y-1, page 1, under the heading "Main Locker Room," I see the statement: "For this room which is 23 feet 2 inches wide by 27 feet 5 inches long by 11 feet 6 inches high—inside dimensions." Do you know whether those dimensions correspond to the dimensions of the locker room as completed?

A. I think it was very close to that size.

The Court: Will you read those again, or are they on a diagram here?

Mr. Lewis Lyon: No, your Honor.

Mr. White: I believe on no diagram, your Honor.

The Court: What are those dimensions again?

Mr. White: "* * * under the heading 'Main Locker Room', I see the statement: 'For this room which

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is 23 feet 2 inches wide by 27 feet 5 inches long by 11 feet 6 inches high—inside dimensions’.”

The Court: 22 by 27 by 11 approximately.

Mr. O’Hearn: 23.

Mr. Lewis Lyon: Instead of 22, it is 23, your Honor; 23 feet 2 inches wide by 27 feet 5 inches long by 11 feet 6 inches high.

The Court: All right.

Q. By Mr. White: Then the question is: “Do you know whether those dimensions correspond to the dimensions of the locker room as completed? [971]

A. I think it was very close to that size.

Q62. Following under the heading “Pre-cooling Room” is the statement: “For this room which is 11 feet wide by 12 feet 1 inch long by 11 feet 6 inches high—inside dimensions.” Is it your belief that those figures correctly or approximately represent the correct dimensions of the pre-cooling room? A. They do.

Q63. Mr. Trullinger, I show you what appears to be a check on The United States National Bank of Portland, dated September 28, 1936, made to Electrical Products Consolidated, in the amount of \$850.00, and will ask you if you can identify the check.

A. I can identify that, yes.

Q64. Do so, please.

A. I identify this check as the one first given to the Electrical Products in the amount of \$850.00 on September 28th, 1936.

Q65. Does the check have any relation to the contract to which you have referred? A. The first payment.

Q66. That is your signature on the check? [972]

A. Yes.

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Mr. White: Let the document entitled "Order," to which we have previously referred, be marked for identification as Plaintiff's Exhibit Y-3, including the matter appearing on the reverse side.

(The document above referred to, headed "Order," dated September 28, 1936, was thereupon marked by the Notary Plaintiff's Exhibit Y-3 for identification.)

Mr. White: Now may the check to which the witness has just referred be identified as Exhibit Y-4.

(The check above referred to, payable to Electrical Products Consolidated, dated 9/28/36, was thereupon marked by the Notary Plaintiff's Exhibit Y-4, for identification.)

Q67. Mr. Trullinger, have you made to date any search to ascertain whether you have other documents corresponding to Exhibits Y-1 and Y-2?

A. I have made this search, but I haven't found them. I told you that when you first started.

Mr. Lyon: Q68. Didn't you also say, Mr. Trullinger, that you didn't take time to look for them?

A. Well, I didn't take time to look until I found them. If you could see my files, you would know that it meant possibly a week's work to go through those files and find [973] that particular letter, because they are filed away in a great mass of other files.

Mr. Lyon: Q69. You didn't take the time to look for them, then, through those files?

A. I went through the original files, yes, and they were not there. You see, everything is transferred out of your original files into files that are kept.

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Mr. Lyon: Q70. The only place that you looked for them was in the original files, where you knew they would have been transferred out of a long time ago?

A. No, I found these checks, among others, and found a part of the stuff in the original files, but I didn't find these others.

Mr. Lyon: Q71. You never looked into the transfer files for the others?

A. No. I didn't look in the transfer files because that would have been a big job.

Mr. Lyon: Q72. In the ordinary course of business they would have been transferred from the original files to the transfer files; is that correct?

A. That is correct.

Mr. White: Q73. You did refer to having found these checks?

A. Yes. They were in the bank statements, which weren't in the files at all. [974]

Q74. Did these checks include Exhibit Y-4?

A. They did, yes.

Q75. I show you what purports to be five additional checks, all drawn on The United States National Bank of Portland, and will ask you, if you can, to identify each of these with reference to the names and figures thereon.

A. You want me to read the checks, the amount that each is made out for and to whom?

Q76. If you will, please.

A. One check to Judd Brown for \$86.37, made out on November 14, was a payment for Redwood bark. S. Birkenwald for \$132.80, November 14, was for two doors to the locker plant. And October 2nd, 1936, to the Eureka Fiber Company, \$299.30, for "Palco" wool, which was

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still Redwood bark ground up. The Lafayette Hardware & Lumber Company, dated October 2nd, for \$291.42, was for lumber for building the box, the locker, the locker box. And the check for \$466.86 to F. J. Leonard, he put in the flooring. He furnished the material and laid the floor with cork, two laminations, six inches of cork. I do identify these checks.

Q77. The materials to which you have referred were used in what construction?

A. In building the locker plant at Yamhill in the fall of 1936.

Q78. What parts of the locker plant? [975]

A. The construction of the box and the insulation. This particular lot of checks, that is material that went into the box.

Q79. When you say the "box," what do you mean?

A. Well, we call the room a box. It is the locker room. It is a big box built right in there, an insulated box, the locker room.

Q80. These checks have been in your continuous possession since received after payment?

A. Up until today.

Mr. White: Will the reporter mark these checks for identification in the order referred to by the witness as Plaintiff's Exhibits Y-5, Y-6, Y-7, Y-8 and Y-9.

(The checks last above referred to were thereupon marked by the Notary Plaintiff's Exhibits Y-5, Y-6, Y-7, Y-8, and Y-9, for identification.)

Mr. White: Q81. The checks bear your signature?

A. They do.

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Mr. White: Q82. Do you know to whom they were given? A. I do, yes.

Q83. To whom?

A. One to Judd Brown, one to S. Birkenwald Company, one to Eureka Fiber Company, one to Lafayette Hardware & Lumber Company, and one to F. J. Leonard, in that particular exhibit.

Q84. Have you any record means by which you can identify [976] the time when construction of the Yamhill locker plant was started? A. These checks.

Q85. Do you have record identification of the time when the installation of the Carrier refrigerating equipment to which you previously referred was started?

A. I have my book here, my ledger.

Q86. What is the book or ledger to which you now refer?

A. This is just a private ledger in which I kept all my investments, and on page 184 in 1936 I made a record of a locker cold storage at Yamhill, Oregon. "Cost"—then I listed these checks as they were issued.

Q87. Was that record one kept in the regular course of your business?

A. Well, I couldn't say. This is a private ledger. It had nothing to do with my business, and I just made a record of those payments as they were made to get an idea of how much that locker plant was costing me.

Q88. For your personal information?

A. For my personal information, yes.

Q89. By whom were the entries on the page to which you refer made? A. By myself.

Q90. In your handwriting as they now appear?

A. Yes. [977]

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Q91. Has this book been in your possession continuously since— A. It has.

Mr. White: Q92. Referring to page 184, will you explain what the entries purport to identify.

A. They identify the checks that were issued to various people who supplied material and labor for the building of the cold storage plant at Yamhill, my building.

Q93. Will you read the entries, please.

A. The first one is F. J. Leonard, on October the 2nd, for insulation, \$466.86. On 9/28, Electrical Products, payment on machine, \$850.00. On October 2nd, Lafayette Hardware & Lumber Company, \$291.42. On October 2nd, Eureka Fiber Company, for insulation, \$299.30. And on 11/10, for insulation, \$86.37. And on 11/10, Birkenwald, doors, \$132.80. And on 11/17 I paid on doors \$13.47.

Q94. Those entries refer to what work and materials?

A. The work and materials that were incorporated into the locker plant which we were building at that time at Yamhill.

Q95. Do you recall whether work was done and materials furnished before or after the date of the entries? A. Oh, before.

Q96. Why?

A. Well, I didn't pay anything in advance. I paid for it after it was installed. [978]

Q97. Is that true with respect to the \$850.00?

Mr. Lyon: It is an effort to get the witness to correct
The Court: Overruled.

A. That is not true—

Mr. Lyon: It is an effort to get the witness to correct his testimony. It shows the character of the leading

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examination of this witness, who will O. K. anything, apparently, that he is led into.

The Witness: No, no. I am not that kind of a man.

Mr. Lyon: Q98. I call your attention, Mr. Trullinger, and ask that you kindly be a little more careful of your testimony, here a little while ago you testified in answer to a leading question that this check had been in your possession ever since it had been issued, that being Exhibit Y-4, which I believe you will agree is obviously incorrect.

A. Why, certainly. Anybody would know that the check has to go through to the man that it is paid to.

Mr. Lyon: Q99. But still you so answered in response to a leading question.

A. The check has been in my possession ever since.

Mr. Lyon: Q100. Ever since it was issued, you stated.

A. Not issued, no. It was sent through and came back from the bank. That would be understood in any court.

Mr. Lyon: That is the reason why leading questions are not permissible in an examination of this kind. [979]

Mr. White: I think, counsel, that the purpose of the deposition may adequately be served by confining the objections to a formal nature.

The Court: The objection is overruled. Let's get on with the deposition.

Mr. White: Q101. There is one more specific question I wish to ask you regarding this exhibit, and that is

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whether you have any other matter of record corresponding to the \$850.00 noted in your ledger.

A. Mr. Eustice paid that, I think, out there. I haven't any record here that he paid the final \$850.00.

Q102. To which \$850.00 payment does this refer?

A. This is the first payment.

Q103. The first payment? A. Yes.

Q104. How was that payment made?

A. By check.

Q105. What check? A. That is Exhibit Y-4.

Q106. Mr. Trullinger, are you acquainted with Mark Postlewaite? A. Very well.

Q107. Do you know his present location and business?

A. Well, I couldn't give you the exact street number. I know where it is. I can go to it. It is up here on the [980] East Side.

Q108. Do you know the name of his business?

A. Yes.

Q109. State it, please.

A. Just at this moment it slips my mind. It is Western Engineering Company, I think; Northwestern or Western Engineering. I think it is Western Engineering Company.

Q110. Did Mr. Postlewaite have anything to do with working on the Yamhill locker plant to the extent that you have described it?

A. He was superintendent or was out there and showed them how to install it, looked it over while it was being installed.

Q111. Do you know with whom he was associated?

A. Well, the Electrical Products.

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Q112. Do you know Mr. Anton Broms?

A. I don't know Mr. Broms.

Q113. Do you know Mr. Gail Shapley?

A. I know Mr. Shapley.

Q114. Did Mr. Shapley have anything to do with the Yamhill locker plant?

A. He was out there and helped install it.

Q115. Did you see him there?

A. Well, it is a long time ago. I wouldn't swear that I did. I know he did work for those people at that time, [981] but there was several men out there who worked. I know Mr. Postlewaite—I took him out there myself one time, so I know he was out there.

Q116. Do you know whether Mr. Shapley was at the plant after it started in operation?

A. Oh, yes; many times. I took him out there myself.

Q117. Mr. Shapley? A. Mr. Shapley, yes.

Q118. For what purpose?

A. Well, for making adjustments, changes.

Q119. Mr. Trullinger, did you visit the Yamhill plant during its construction?

A. Oh, yes. I was out there every week end.

Q120. For how long, approximately?

A. For an hour, I would say. It might have been two hours. I don't know. I would go out there in the afternoon. I was in business here in Portland.

Q121. What did you do while there?

A. Just merely looked over the place. I didn't have anything to do with the building of it myself, any further than I paid the bills.

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Q122. What did you look over, as you put it, while there?

A. Well, the way they put in the insulation, the way they were building the box, the way they were installing the equipment. [982]

Q123. After installation of the equipment did you visit the plant? A. Yes.

Q124. How frequently?

A. Oh, at first possibly every two or three weeks. I don't know. I can't remember just the exact time, or whether it was that often or not, but several times any way.

Q125. And when there did you observe the installation? A. Yes.

Q126. To what extent?

A. Well, by looking the thing over and seeing what it was doing and checking it as to cold, and how it was operating.

Q127. Will you describe generally the refrigeration equipment installation made to cool the locker room?

A. The first installation, we set up—or the Electrical Products set up a diffuser in the cool room, or in the pre-cooling room, or in the anteroom, or the room outside of the main locker room, and they connected it up so that it blew the cold air into the locker room. And they took the air out at the bottom and through the diffuser, the cold diffuser, and forced it back over the top. They attempted to defrost that after it ran for two or three days. The vanes in the machine would gather frost and that would stop the circulation, and they attempted to defrost that by reversing the refrigerant, which would be hot on one side and cold on the other, and by [983]

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reversing it they would bring the hot refrigerant back through the machine and melt the ice off of the machine.

Q128. May I interrupt? In the testimony which you are now giving will you please explain those things which you personally observed.

A. That is what I am doing. Several times I was out there and we discovered that the machine was not defrosting properly; that this reversing of the hot liquid did not defrost properly, and we objected to the installation on the ground. Mr. Hulse said that he would change the installation by putting in a water defrosting apparatus, something that he would build himself and put in there, and that it would do the defrosting properly. Mr. Hulse then went ahead and built this arrangement that he put into the machine, which was a movable water sprinkler for defrosting, and we found that it did not work very well because it was in the cool room, and it made the cool room too cold—that is, the diffuser—and he went ahead then and said that he would build an insulated wall around this cold diffuser. He did that and the plant worked all right from then on.

Mr. White: There, your Honor, is the answer to the assertion made some time ago that there is no testimony that the plant did not operate satisfactorily or did operate satisfactorily.

Q129. You refer to a spray pipe? [984]

A. Yes, sir.

Q130. Do you know where that spray pipe was?

A. Well, it was placed just over the vanes in the machine, and it had a lever on it that we could swing back and forth, and this spray pipe had little holes all along it,

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and we turned the water through that and the water going down through the diffuser melted the ice from the vanes.

Q131. When you say "vanes," what do you mean?

A. Well, the diffuser is like a heating plant: The refrigerant goes through all these little pipes, and on each one of those little pipes there is a little vane sticking out to take up the heat as the air comes through, and the air passes up through those vanes and the refrigerant takes the heat out of the air and sends it back cold.

Q132. The refrigerant goes through the pipes?

A. The pipes, yes.

Q133. The vaned pipes?

A. The vaned pipes; that is it.

Q134. And where was this spray pipe with relation to the vaned pipes? A. Above.

Q135. How was water supplied to this spray pipe?

A. Well, we had an arrangement down underneath in the basement with a water pipe leading from the water system, just the city water system, and we had a valve there that we could [985] turn and turn water through it. When we turned it off it had a little bleeding place there that allowed the water to go back down out of the pipes so it wouldn't freeze as it went up into the freezing plant. Then underneath that, where the water went down through, we had a drain pipe that ran out down onto the floor in the basement. We had a barrel there or something to catch the water, or we just—our basement is just a dirt floor, and we let the water run on the floor.

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Q136. I show you what purports to be diagrammatic views, includings Figs. 1, 2 and 3, and will ask you how these views compare with your recollection of the installation.

Mr. Lyon: That is objected to on the ground it is not the best evidence; incompetent, irrelevant and immaterial, and leading and suggestive; on the further ground there has been no proper foundation laid for any such views or secondary evidence.

The Court: There isn't any foundation laid for these diagrammatic schemes. Which ones are you referring to, incidentally, here?

Mr. White: It is intended to be merely illustrative of his recollection of the installation as it exists.

Mr. Lewis Lyon: It is objected to on the ground it has already been asked and answered.

The Court: There is no foundation for the diagrammatic scheme. Where did it come from? Who did it? The objection [986] is sustained.

Q137. Mr. Trullinger, does this equipment, as you have described it, still exist at Yamhill?

A. It does.

Q138. In the same condition?

A. Well, it is not installed now, but we have that same equipment out there. It was taken out. We don't use it any more.

Q139. How do these drawings compare with your recollection of the equipment as it existed when first installed and operated?

Mr. Lyon: The same objection.

The Court: The same ruling.

Mr. Neave: May I speak to that, your Honor, a moment?

The Court: Yes.

Mr. Neave: As I understand it, it is quite admissible for a witness to testify as to a photograph or a map or a drawing that it represents his recollection of a particular situation. Now, there are cases in this state, your Honor, stating that such maps are admissible and such photographs are admissible when the witness has testified that they do represent the situation.

The Court: A map?

Mr. Neave: Or a drawing or a photograph.

The Court: Or a photograph? [987]

Mr. Neave: Or a photograph.

The Court: That would be different than a schematic drawing. There is pretty nearly always a foundation laid for a photograph or a map, or the foundation is waived. Usually it is waived. But for a schematic drawing, where somebody pulls it out of the air after a man has described it, and says, "Does this represent what you have in mind?" I think it is objectionable, too, on the ground it is leading and suggestive in any event, on direct examination.

Mr. Neave: The thing I am getting at, your Honor, is that as a basis for the offer of these exhibits we want the testimony that the exhibits represent what the condition of the plant was, as shown on those exhibits. Now, he is shown a drawing. It doesn't make any difference where it came from. Or, he is shown a photograph, and he doesn't know where the photograph came from. It makes no difference if he can identify that the layout was the same as it existed; then that document is admissible as illustrative of what his testimony is. So we want to

have the testimony in, in order to get in the document. I have cases on that for your Honor, if you would like them.

The Court: I think I am familiar with the general rule. Almost invariably a photograph or a document is identified somewhere, or some foundation is laid for it. If that were permissible in every patent case somebody would produce a [988] witness and show him a drawing of the patent and say, "Isn't this what you thought of twenty-five years ago? That is the way you dreamed that thing up, isn't it?"

Mr. Lewis Lyon: Yes.

The Court: And he would say, "Yes."

Mr. Neave: I think you are going now to what it may prove. That is what its probative value is, and not as to its admissibility, but as to its weight.

The Court: I don't think such a question as that would be admissible in a patent case, or any other case, or in the patent in suit. Otherwise, people might say, "Isn't that the way you thought of this?" And the answer would be, "Yes, just that way."

Mr. Neave: I agree with you in a leading question of that kind.

The Court: That question is a leading question. It suggests the answer to him.

Mr. Neave: I don't recall, but there is another question saying: What is this? What does that represent?

What I am really getting at is if he says, "What does this represent?" and the answer is, "It represents the layout of our plant," then that document is admissible and the statement is admissible. I am not talking about the leading part of the question.

The Court: The objection is sustained. [989]

Would you like to have a rest for a little while, Mr. White?

Mr. White: Very well, your Honor.

(A short recess was taken.)

Mr. Neave: May it please the court: I have been trying to think of some way of shortening this procedure, and we have been having a little discussion about it. I would suggest this, that instead of reading all of these depositions into the record, that we simply offer them the way we did some of the other depositions, the direct and redirect testimony of these various witnesses whom we will name, and then we will offer certain of the exhibits.

The Court: Reading those portions which you wish to call my particular attention to?

Mr. Neave: Yes.

The Court: As I wouldn't feel satisfied to let the depositions go into the record and not know their contents.

Mr. Neave: Yes.

The Court: And I have no intention of taking the time to read them, because I have too many things that command my attention as soon as I walk through that door.

Mr. Neave: Yes. Once they are in the record, I was wondering whether your Honor's attention might not be called to the pertinent portions during the argument, and whether that would serve the purpose? [990]

The Court: It might. What do you think?

Mr. Lewis Lyon: I think it might, your Honor, in this particular case.

The Court: Reading the other witnesses' or this witness' direct testimony has straightened out something in my mind that I didn't have accurately from the previous witness, nor from the statement of counsel.

If that is agreeable to the parties, it is agreeable to me.

Mr. Neave: I think, your Honor, it might be well to finish Trullinger's testimony, the direct, now that we are in the middle of it, and do that with the rest of the depositions.

The Court: You don't have many left, do you?

Mr. Neave: Oh, there are quite a few. I think there are three others; three or four others, all on this prior use.

The Court: Yes, but we are on the Yamhill depositions, and that is the last.

Mr. Neave: That is the last prior use.

The Court: So you have only three or four different depositions left?

Mr. Neave: Yes.

The Court: Out of twenty-seven. I think you are getting down pretty well.

Mr. Neave: We are making some progress anyway. Then suppose we finish this direct testimony. [991]

The Court: Then counsel can do whatever he wishes about the cross examination.

Mr. Lewis Lyon: Yes. When we get to that, I will determine what I want to do with it. There are parts that I will definitely want to call to your Honor's attention, and I may want to read it.

Mr. White: We will start with the question at the bottom of page 30.

The Court Yes. I had sustained the objection to the introduction of the schematic diagram, so that would be the next following question after that.

Mr. Lewis Lyon: I think that concludes the deposition. It is all on that, on the endeavor to use these.

Mr. White: On page 30, following the statements in the record concerning this exhibit a statement is made by me that the witness has testified that he was present at frequent intervals and that he saw the equipment then existing, which no longer exists. I call attention to that as a preface to the question which Mr. Lyon asked, and then my statement was followed by Mr. Lyon's statement three lines from the bottom of the page.

The Court: He said the equipment was in existence but it was no longer in use. I think that was the statement he made. I made a note of that answer.

Mr. Lewis Lyon: No, that is just the point of my last [1982] statement, your Honor. He said, no, he hasn't.

Mr. O'Hearn: I beg your pardon.

The Court: "I have seen the equipment taken out" is the note I made, or at least that is the substance of his answer. In other words, he had it some place that he was not using it.

Mr. O'Hearn: It was not in use.

Mr. White: The answer is, specifically:

"Well, it is not installed now, but we have that same equipment out there. It was taken out. We don't use it any more."

The Court: Is that the end of his direct?

Mr. White: No, sir.

The Court: I think you should start with Question 140. [1993]

(Deposition of Fred L. Trullinger)

Mr. Lyon: Q140. Why isn't it in use?

A. Well, that comes later.

Mr. Lyon: Q141. Well, why isn't it in use?

A. We found out that there is so much better equipment than water for the defrosting of diffusers that we wouldn't think of ever going back to using water as a defroster.

Mr. Lyon: Q142. When did you take it out?

A. 1938.

Mr. White: We will come to that later, counsel.

Mr. Lyon: Q143. Because it did not work satisfactorily; isn't that correct?

A. No, wait a moment. Yes, it did work satisfactorily, but we have got something much better now. The plant worked all right, but it required work, and we wanted something that did not require a man to do the work, which we have now.

Mr. White: Q144. Mr. Trullinger, when I refer to these views and say "equipment" I mean all the equipment represented on those views. Now does all that equipment still exist at Yamhill as connected and laid out as you see it in these views? A. No, it isn't now.

Mr. Lyon: That refers to the same sketch and same objection, your Honor.

The Court: What?

Mr. Lewis Lyon: I say that refers to the same sketches [994] that were presented to the same witness and objection has already been sustained to that line of examination.

The Court: Let me hear the question again.

Mr. White: "Mr. Trullinger, when I refer to these views and say "equipment" I mean all the equipment rep-

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resented on those views. Now does all that equipment still exist at Yamhill as connected and laid out as you see it in these views?"

The Court: I don't know what views you are referring to.

Mr. Lewis Lyon: The views were the sketches that were presented to him and your Honor previously ruled them out.

Isn't that right, Mr. White?

Mr. White: That is true, so far as the sketches are concerned. I was merely trying to establish whether the witness knew as to the then present existence of the equipment.

The Court: Of course you can't change your question now because the witness is not here, so I guess I will have to sustain the objection, which is now made.

Mr. White: Q201. Mr. Trullinger, will you explain the situation of the diffuser when it was first installed.

A. It was installed in the cool room or the room adjacent to the locker room.

Mr. Lyon: That is objected to as already having been asked and answered a couple of times.

The Court: Objection sustained. [995]

Mr. White: Q202. Will you describe the operation as you saw it when water was first used to defrost the coil?

Mr. Lyon: That is objected to as already having been asked and answered.

The Court: Objection overruled. It wasn't asked, and answered, of this witness.

A. The diffuser bottom and top intake of air was closed so that there would be no cold air coming through from

(Deposition of Fred L. Trullinger)

the locker room. I am giving you the operation of the plant now, as it would be operated. Then whoever was doing the work would go downstairs and turn on this stop and waste valve, which would force water up through this pipe which sprinkled the water down over the coil. And as it was being sprinkled through he would take hold of the lever and pull it to different points on the coil, and when the ice was cleared he would go back down and close his valve, which immediately opened the waste and allowed the water to run back, or it ran up to the point where it ran down to this point for sprinkling.

Q203. When you say "allowed the water to run back," what do you mean?

A. Well, the waste would open and allow the water to run back.

Q204. Run back from where?

A. From this pipe that led up to the sprinkling pipe. You see, that went into a cold room and would freeze up if it didn't leak the water back. [996]

Q205. And where did the water run that was so drained?

A. Oh, just out on the floor. It was a dirt floor.

Q206. Where was that dirt floor?

A. In the basement.

Q207. In the basement? A. Yes.

Q208. Where was the stop and waste valve with relation to the basement?

A. Well, it was in the basement, up near the ceiling of the basement. You had to reach up to turn it on.

Q209. At its present location?

A. Yes, at its present location.

(Deposition of Fred L. Trullinger)

Q210. When the diffuser unit was first installed was it visible in the chill room?

A. Yes, it was not covered up.

Q211. You mean that it was openly placed?

A. Openly placed, yes.

Q212. Was that condition satisfactory?

A. No, it wasn't satisfactory.

Q213. Why not?

A. Well, it got too cold. It made the cold room too cold.

Q214. When you say "too cold," what do you mean?

A. Well, we wanted to carry that at about 35, and it ran it down to below freezing. [997]

Q215. How did you know it was below freezing?

A. Well, I saw ice on the meat. The meat would freeze up and the vegetables would freeze. And we had a thermometer there, too, which would show that it went down to 30, which was entirely too cold for a cool room.

Q216. Where was that thermometer, Mr. Trullinger?

A. Oh, on the wall; just hanging on the wall.

Q217. In the chill room?

A. In the chill room, yes.

Q218. Did you personally read the thermometer?

A. Yes.

That is why we objected to the installation.

Mr. White: Q219. During that time and from your recollection of reading the thermometer, was the temperature in the chill room above or below freezing?

A. Well, sometimes it would be below and sometimes it would be above, but its being below is why we objected.

Q220. Was anything done to correct that condition?

A. Well, an insulated wall was put around the plant.

(Deposition of Fred L. Trullinger)

Q221. Is that insulated wall identified on the drawing?

A. It is.

Q222. Where, please?

Mr. Lyon: That is the same drawing, your Honor.

The Court: Yes.

Mr. White: Q223. What did that insulated wall do to the [998] space occupied by the diffuser unit?

A. Well, it insulated it from the chill room so that the chill room would hold its steady temperature.

Q224. How high did that wall extend?

A. Oh, it extended up to the top of the room.

Q225. From the floor?

A. From the floor up to the top, yes.

Q226. After the insulated compartment wall was installed how was the spray pipe handle operated?

A. With a lever that came out through the wall.

Q227. Do you find the lever on the print?

A. It is shown here on the print.

Q228. Designated as what?

A. Designated as the "Spray Pipe Oscillating Handle."

Q229. How did that handle operate?

Mr. Lyon: That is objected to as having been already asked and answered several times.

Mr. White: Q230. From what point?

A. From the outside you push it in and out, and that worked a lever inside which moved the pipe back and forth and sprayed the water down over the coil.

Q231. Had you made any observations concerning temperature conditions in the insulated locker room before the insulated compartment wall was placed?

A. No. We held it at about 10 above zero, and that is [999] the way it always was, and I didn't notice any differ-

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ence—any change other than that we could defrost now and before we couldn't.

Q232. What is the basis for your statement that a temperature of zero to 10 degrees existed in the locker room?

A. Ten degrees above zero. We had a thermometer there, and it was held at or near that. Of course, there was times when it might be higher or it might be lower, but that was the attempted temperature to be held.

Q233. Did you personally read the thermometer?

A. Oh, yes; many times.

Q234. Can you compare the temperature in the insulated locker room and the temperature in the insulated compartment.

A. No, I have no way of comparing that.

Q238. Did you see the unit in the insulated compartment?

A. I helped build the compartment. While it was being done I drove nails on the wall. I saw it in there, yes.

Q239. Did you personally operate the water defrosting system?

A. Several times, yes.

Q240. Mr. Trullinger, what did you do exactly when you operated that system?

Mr. Lyon: That is objected to as already asked and answered.

Mr. White: We have no record of the witness' answer.

Mr. Lewis Lyon: The answer is, "I told you a while ago just exactly." so apparently the witness agreed with me. [1000]

The Court: He testified a little previously there that the way it was defrosted was that he agitated the handle

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and sprayed the water. Of course, the question technically was not asked and answered, but you asked him, "What did you do." Is it necessary to go into that? Is he going to say that he turned the valve down, went and agitated it, the water ran down and and then he turned it off?

Mr. White: The purpose was to establish what this man himself did in going through the operations.

The Court: Objection overruled. Let us find out.

A. I told you a while ago just exactly. I could repeat that same formula that I did personally. If that is necessary, I can say that all over again.

Mr. White: Q241. Did the water defrost system as you personally operated it satisfactorily to you defrost the coil?

Mr. Lyon That is objected to as calling for a legal conclusion, and on the further ground that the witness is not competent to answer any such legal question.

The Court: Overruled.

A. It was satisfactory.

Mr. White: Q242. Did it defrost the coil?

A. It did.

Q243. Did you observe the coil afterwards?

A. Yes, it did. [1001]

Q244. Compare the appearance of the coil before and after you operated it.

A. Before it was all closed up with ice and frost, and afterwards it was clean of frost and ice.

Q245. What happened to whatever was removed from the coil?

A. Oh, it melted off and went down through the drain pipe.

(Deposition of Fred L. Trullinger)

Q247. Do you know whether that drain pipe is still in existence?

A. Well, it may be out there. I couldn't say. I don't know. There is a hole there in the floor; I know that; but I don't know where the pipe is. It may be laying around in the basement somewhere. I think it is still there. I think it is still in use, because we still use that same drain to carry off the water when we defrost it. I think that pipe is still in there.

Q248. Over approximately what period of time was this water defrost system used?

Mr. Lyon: We object to that on the ground it is asking for a presumption.

The Court: Asking for what?

Mr. Lewis Lyon: A presumption that it was used, I guess.

The Court: Overruled.

A. Well, it was used for several years; two years, at least.

Mr. White: Q249. Starting at what time? [1002]

A. Around 1937; in January, I think. We have got the figures here showing when we paid for the work that was done. I don't know just the exact date, but there is figures showing that. You can get that from the last payment of the check, because that was the date that that \$850.00—the last payment was made.

Mr. White: The witness has pointed to a paper captioned "Invoice, Electrical Products Consolidated."

Q250. Do you recall having seen before that paper or one like it?

A. Yes, I recall that, because that was the last—maybe not this particular one, but a one in which we paid the last

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payment of \$850.00. That was on December 14th, 1936. That is when we told him, or within a week of the time that we told him the plant was satisfactory.

Q255. Do you recall what eventually happened to this water defrost system which you have described?

A. Well, we took the diffuser and put it into the main room, and then we used air instead of water for defrosting.

Q256. By the "Main Room" you mean the locker room?

A. We put it in the locker room. We took it out of the chill room and moved it into the locker room and put in air ducts and used air for defrosting.

Q257. Is the same unit still in the locker room?

A. The same unit, yes. [1003]

Q258. I will ask you, Mr. Trullinger, to identify the photograph, if you can, which I now hand you.

A. This is the basement floor looking up—the basement ceiling, looking up toward the ceiling in the basement.

Q259. By the way, have you recently inspected this basement ceiling to which you refer?

A. Oh, I was out there Sunday two weeks ago; not particularly to inspect it, but I saw it.

Q260. Proceed with your identification of the photograph.

Mr. Lewis Lyon: I would like to interrupt at this time. You eliminated the matter on page 54, your attempted identification of the document, to which Mr. Trullinger testified, as he alleged, showing the second payment of \$850.00, also the testimony about searching his records.

The Court: I notice that there wasn't any document offered in connection with the last payment. He said something about an invoice, but it was not offered.

(Deposition of Fred L. Trullinger)

Mr. Lewis Lyon: It was offered, but he just skipped it. There is a particular point with reference to the document Y-14 or Y-13.

Mr. White: Let's read that portion of the record on page 54, beginning with question 253:

Q253. Mr. Trullinger, have you searched your records to ascertain whether you have a paper like this one, which I will now ask to be identified as Plaintiff's Exhibit Y-13? [1004]

(The document above referred to, headed "Invoice, Electrical Products Consolidated," dated December 14, 1936, was thereupon marked by the Notary Plaintiff's Exhibit Y-13 for identification.)

A. I have searched, but I don't think I found anything like that. I know that we had one at the time; that we had a receipt for our money. But I don't remember finding that particular billing.

Q254. How does the date of Exhibit Y-13, December 14, 1936, compare with your recollection of the time when the installation and its operation were approved?

A. It was about that time.

Mr. Lewis Lyon: I would like to point out that I objected to that as leading—and it is very material, not that I want the answer stricken, but it shows the character of the witness' testimony, as will be brought out on cross examination.

The Court: All right. Then you are going to argue later that at page 184 he doesn't show the second payment?

Mr. Lewis Lyon: No, your Honor. The point of that is on cross examination this document, Y-13 which he

(Deposition of Fred L. Trullinger)

identified as showing the final payment establishing the date, and so forth, he admits was merely another billing for it, and it doesn't show any payment at all.

The Court: The document doesn't show any payment on its face, nor does page 184 of his personal ledger show any such [1005] payment.

Mr. Lewis Lyon: No, your Honor, but here he says that it does, that this document Y-13 is the second payment. Not only he, but another witness makes the same assertion and has to back up when he actually looks at the document.

The Court: Well, we will argue that when we get to it.

Mr. White: We were previously referring to page 55, to a photograph.

Q260. Proceed with your identification of the photograph.

A. Well, this is just under the stairway as you go down, and this water pipe here is not used for the purpose which we used it then. You can see where there was a hole in the floor, but it was not used for that purpose.

Q261. In referring to the pipe will the witness please mark that pipe "P."

A. That is this pipe here. This is that stop and leak pipe. That is used for another purpose entirely now.

Mr. White: The witness has just placed a cross mark on the elbow of the pipe.

Q262. What does that pipe contain or what did that pipe contain at the time when the water defrost system was in operation?

A. That led the water from the water main, the regular city water main, into the diffuser sprinkler system.

(Deposition of Fred L. Trullinger)

Q263. I call your attention to a part immediately beyond [1006] the elbow which you have marked.

A. That is the stop and waste we used at that time.

Q264. Is that stop and waste still existent?

A. Yes, it is still there.

Mr. White: Let the photograph be marked Plaintiff's Exhibit Y-14.

(The photograph above referred to was thereupon marked by the Notary Plaintiff's Exhibit Y-14 for identification.)

Mr. White: Q266. I now hand you another photograph and will ask you to identify the same, if you can.

A. This is that same pipe that was in there at that time.

Q267. Will you mark that pipe described.

A. It is not in use any more, but that is the pipe that we used at that time.

Q268. I notice a part appearing on the photograph as "1/2 inch Crane." Is that the stop and drain valve to which you referred?

A. That is the stop and drain valve we have referred to.

Q269. Will you please mark that.

A. I did, with a cross.

Q270. A cross with a circle around it?

A. All right, with a circle around it.

Mr. White: Let this last photograph be marked Exhibit Y-15. [1007]

(The photograph above referred to was thereupon marked by the Notary Plaintiff's Exhibit Y-15 for identification, and the same is attached.)

(Deposition of Fred L. Trullinger)

Q271. Going back to Y-14, Mr. Trullinger, can you identify the large pipe?

A. That is the drain pipe we use still today. It is the same pipe we used then.

Mr. White: Q273. Will you mark that pipe "D," please.

A. (Marking on photograph). It is a slippery "D."

Q274. I show you another photograph, Mr. Trullinger, and ask you if you can identify this one.

A. This particular one is in the installation around the air duct pipe which we have in there now.

Q275. I call your attention to a dark mark on a wall.

A. That is the old line where we put in the insulated wall that was taken out when we moved the diffuser inside of the locker room.

Q276. What insulated wall is that?

A. Well, that was the chill room, or the insulated wall that went around the diffuser. This wall here (indicating).

Q277. Appearing immediately below the words "Insulated Compartment" in "Fig. 1"?

A. That is right.

Q278. Does this photograph accurately represent the [1008] appearance of that wall mark today?

A. Oh, I wouldn't say; I don't know. I never paid any attention to that mark, but I know there was a wall along there.

Mr. White: May this photograph be marked for identification as Y-16.

(The photograph last above referred to was thereupon marked by the Notary Plaintiff's Exhibit Y-16 for identification.)

(Deposition of Fred L. Trullinger)

Mr. White: Q279. I show you a further photograph and will ask you to identify the same, if you can.

A. That is the diffuser as we have it installed at the present time in the locker room.

Q280. In the view you notice a hand carrying a pencil pointing toward what appears to be a hole. Can you identify that hole?

Mr. Lyon: That is objected to on the ground there has been no proper foundation laid.

The Court: Overruled.

A. We cut that hole in there to put the pipe through for distributing the water.

Q281. Did you personally see the distributing pipe in that hole? A. Yes, I did.

Q282. And that is the hole which contained it in the unit [1009] at the time to which you referred.

A. Yes.

Mr. White: Let this be marked as Exhibit Y-17.

(The photograph above referred to was thereupon marked by the Notary Plaintiff's Exhibit Y-17, for identification.)

Mr. White: Q283. In this final photograph you will note what appears to be a fowl. A. A turkey.

Q284. Will you tell us what you know about that turkey?

A. This turkey was filled with water as an experiment. All this thing was new to us, so we thought we would advertise it to the neighborhood what freezing would do. We filled the turkey with water, froze it, and set it up on top of a locker box before this unit was placed inside.

(Deposition of Fred L. Trullinger)

Q285. When was this turkey so prepared?

A. Well, that was November the 1st—November something there, 1936.

That ticket was put on there at that time. It has been there ever since.

Q286. Mr. Trullinger, who was it prepared the turkey? A. Mr. Eustice.

Q287. Did you see him do it?

A. No. He showed it to me shortly after it was in there.

Q288. The turkey was placed in what room? [1010]

A. In the locker room.

Q289. Have you actually seen that turkey?

A. Oh, yes; for many years.

Q290. How frequently have you seen that turkey since that time?

A. Well, I see it every time I go in the plant, because it is right there in the door. You can't help but see it.

Q292. When, to the best of your recollection, did you first see what appears to be a tag on the turkey?

A. That was placed on the turkey when it was first put in there.

Q293. For what purpose?

A. To show to customers how long we had had that turkey in the locker plant.

Q294. Is the turkey still in existence?

A. Oh, yes. It is still there. I wouldn't want to eat it.

Q295. Why not?

Mr. Lyon: It wouldn't be edible, would it?

A. It wouldn't be edible; not now.

(Deposition of Fred L. Trullinger)

Mr. White Q296. Why not, Mr. Trullinger?

A. Well, it is dehydrated. It is dried out.

Q297. What as to its condition otherwise?

A. It has the form—

Mr. Lyon: That is objected to as calling for a conclusion of the witness; on the ground the witness is not qualified to [1011] answer such a question as to its condition otherwise.

The Court: Didn't you waive the objection when you asked him whether or not it was edible?

Mr. Lewis Lyon: He is asking about the "otherwise."

The Court: Yes, I know. The objection is overruled.

By Mr. White:

Q298. Based upon the experience to which you have testified in connection with locker plants, what would you say as for the last time you saw this turkey is its condition with respect to its state of preservation?

A. Oh, it is still preserved.

Q299. About how recently, Mr. Trullinger, have you observed that turkey?

A. I saw the turkey about a week ago last Sunday. I was out there.

Q300. What relation does the present condition of the turkey bear to the refrigerating conditions in the locker room?

A. Well, it shows that for all these years the turkey has been frozen and it has not spoiled. And that is what we put it in there for, to advertise to the patrons that the turkey—in the early days when we first started this no one would believe that you could freeze anything and make it keep. They had to be shown, and this is the demonstration.

(Deposition of Fred L. Trullinger)

Q301. About what was the locker capacity of the locker room?

A. Three hundred fifty lockers, I think. I am not [1012] certain about that. There is more in there than that now, but that was about the size then.

Q302. You spoke of the water defrost system having been discontinued in favor of another type of defrost system.

A. Air.

Q303. About when, to the best of your recollection, was that change-over made?

Mr. Lyon: That is objected to on the ground that the witness has not been qualified to answer the question.

The Court: Overruled.

A. Well, it would be a guess. It was several years afterwards. I don't know just how long.

By Mr. White:

Q304. Until the hot air defrost system was used what means did you use from the start of the operation of this plan for defrosting the coil?

A. We used water sprinkled over the coils.

Q305. The same system that you have described?

A. Yes.

Q306. And the only system?

A. Well, we originally started with hot gas, but it failed to work.

Q307. I mean after starting the water defrost system and until warm air was substituted water was the only system?

A. Water was the only system. [1013]

(Deposition of Fred L. Trullinger)

Q308. Was the water defrost system for your purpose satisfactory?

A. It was. It did work, but it required more work than the air.

Mr. White: Let that photograph be labeled Plaintiff's Exhibit Y-18.

(The photograph referred to was marked Plaintiff's Exhibit Y-18 for identification.)

Mr. White: You may cross examine.

Cross Examination

By Mr. Lyon:

Q309. Mr. Trullinger, have you any record of any kind or character when you stated that this change-over was made to place the Carrier diffuser unit on the inside of the locker room? A. I have records on that, yes.

Q310. Where are they?

A. Well, they are in my office.

Q311. You have not produced them?

A. I wasn't asked to produce them.

Q312. Now, you have stated that you could see, after this insulated wall which you have identified as having been placed around the diffuser unit, and that you did see the condition of the coils in the diffuser unit before you defrosted those coils; is that correct? [1014]

A. That is correct.

Q313. How could you see them?

A. Through this opening right here. You look right up here.

(Deposition of Fred L. Trullinger)

Q314. From the bottom you could look up?

A. Oh, yes. You can go there and see now, right up and see those coils.

Q315. You got down on your hands and knees and looked up at those?

A. That is the way you tell when you have got it defrosted. That is the only way you have. We had to do it.

Q316. You got down and looked up. What part of those coils can you see? A. The bottom.

Q317. You could only see the bottom coil; isn't that true?

A. That is true. And when that is defrosted it is all defrosted, because it defrosts from the top down.

Q318. You can only see one part of those coils; not the whole length of them; isn't that true?

A. What do you by mean by that?

Q319. You can't see the whole length of the pipe from the position that you can look?

A. Oh, you mean each pipe, these coil pipes at the bottom? [1015]

Q320. That is right.

A. I don't think you can see the coils at all. I think all you see is those vanes. It is like an automobile radiator.

Q321. How much of the length of those vanes can you see from looking up? How much did you ever see?

A. I would imagine about a foot.

Q322. About one foot of them. How long is that diffuser unit?

A. Well, you see the whole length of it when you look up through. You can see from one end to the other. You

(Deposition of Fred L. Trullinger)

see, it is about five feet long, I think; just about five feet feet this way.

Q323. You can see about one foot of it when you look up?

A. One foot this way, but you can see the whole length this way.

Q324. The whole length?

A. That is right. Here is your line of vision, right here. You can see from here up to there (indicating).

Q325. Isn't it a fact, Mr. Trullinger, that before you started to defrost you had a vane which you closed over that opening, closed completely over that opening?

A. Not when it was out in this other room. We couldn't do that. It was out in the other room, mind you.

Q326. You couldn't go on inside of the locker room and close the vane? [1016]

A. No, this vane is in the inside. It is in the locker room. There is a door right there that we opened and looked in.

Q327. I see. And over that opening you had a vane, didn't you? A. At the top.

Q328. And at the bottom?

A. Well, at the bottom we just had a door that closed.

Q329. And that door at the top and at the bottom of those vanes was for what purpose?

A. To let air in and out.

Q330. Why did you close it?

A. So that the water would not freeze when we were pouring it down through there. If we left that open we would have the air from the freezing room right in there.

(Deposition of Fred L. Trullinger)

Q331. That would freeze the water?

A. Well, it would; yes, surely.

Q332. You found that out from observation, did you?

A. Well, we thought it would.

Q333. Did you ever see it do it? A. No.

Q334. Now, is it my understanding that you actually, when you said that you operated this system, got down on your hands and knees and looked at the coils before you turned on the water? [1017]

A. No, sir; didn't need to.

Q335. Is it my understanding—

Mr. White: Just a moment. Let the witness finish his answer.

The Witness: We didn't need to look before. It is after, when you have defrosted; that is when we wanted to know, not before.

By Mr. Lyon:

Q336. Is it my understanding that you personally got down on your hands and knees and looked up on the coils after you had turned the water on?

A. Absolutely, because it was given to me to do, and I had to do it to know that it was done.

Q337. Was that before or after you turned the water off?

A. That was after we turned the water off or before, either one. It didn't make any difference when we looked.

Q338. Well, when did you look? I am asking you; not when somebody else looked. When did you look?

A. Ask me back at 1936. Let's see; that would be—six from fifteen is nine years ago—whether I looked before or after. I may have looked at both times.

(Deposition of Fred L. Trullinger)

Q339. You can't tell me now?

A. Well, it is immaterial whether I did before or after?

Q340. You can't tell me now which one it was? [1018]

A. Why, absolutely not.

Q341. You have no recollection of whether you looked before you turned the water on or afterwards?

A. I couldn't tell you whether I went out to piss before.

Q342. Just keep it on the record, please. Now you have also testified, in referring to this photograph which has been testified, in referring to this photograph which has been marked Exhibit Y-14, that this pipe which you have marked "D" was drain pipe is that correct?

A. That is correct.

Q343. And that drain pipe is now in exactly the same position that it was before; is that correct?

A. No, sir. It has been moved into the locker room now. When we moved the machine in we moved the drain pipe to take the same place.

Q344. Now was there anything else done at the time that pipe was moved? A. Which do you mean?

Q345. Anything else done to the ceiling? Any holes plugged up? A. I don't think so.

Q346. And the hole would still be there showing its original position? A. It should. [1019]

Q347. Will you look at the photograph and see if you can find where the hole is.

A. I think it should have been—this is looking up here. I don't see anything, but it is this place right here (indicating on photograph). There might be a hole there.

(Deposition of Fred L. Trullinger)

Q348. That is on the other side of the beam, is it not?

A. Yes. You see, the machine was moved from this room over into this room. Now there must have been about five or six feet between this hole and the next hole, wherever that might be.

Q349. Now doesn't that hole on the other side of that beam indicate what you previously referred to as the hole through which the water delivery pipe extended?

A. This hole here. I think it is.

Q350. I see. But you can't find the other hole that you say the drain pipe was moved to?

A. I am not trying to find it. I am not trying to find it. The hole is there. You can go and see it for yourself.

Q351. You don't find it on this photograph?

A. He didn't put it on the photograph.

Q352. Somebody didn't fix this photograph so it was on there; is that what you mean?

A. No, no. You know better than that.

Q353. No, I don't.

A. Well, you should. You don't fix up a photograph.

Q354. You can't find a hole on that photograph, can you? [1020]

A. I know there is a hole there. That is all I need to know and all you need to know, too. There was a hole there.

Q355. But you can't find a hole on that photograph?

A. Well, I didn't take the photograph. If I had taken the photograph I could have taken the hole. [1021]

Q356. You were not present when the photograph was taken? A. Absolutely not.

(Deposition of Fred L. Trullinger)

Q357. Do you know when the photograph was taken?

A. No, sir; I have no idea when that photograph was taken. Let's hurry this up.

Q358. I am sorry, Mr. Trullinger. You can't tell me to hurry this thing up, because, after all, you have spent from eight o'clock to 10:45 on direct examination.

The Witness: Let's hurry it, anyway, because I want to get home. I have got to get up in the morning.

Q359. Now when you kept this personal record and entered the cost of this locker plant therein, as you have testified, on page 184, I believe you testified that you entered into that record the total cost of that locker room for your investment purposes, did you not?

A. Well, if I did, that was a mistake. I testified that this was a list of the checks as I wrote the checks. I wrote them in there. There is a lot of other costs. That locker plant cost around five thousand dollars. There is only just a small amount of it there.

Q360. I see. Well, then this record that you kept is only a partial record and was kept not in the regular course of business and partially for your own information; is that correct?

A. It was for all of my own information, covering these [1022] checks. These are the only checks that I paid out. All the others were paid out by Eustice out at Yamhill.

Q361. Now you have identified this document, Y-13, as being an invoice showing the final payment to the Electrical Products Company have you?

A. That is right.

(Deposition of Fred L. Trullinger)

Q362. You are acquainted with bookkeeping, are you not?

A. Well, I should know something about it.

Q363. Don't you see an extension of \$850.00 still due and owing, according to that statement? Isn't that the receipt which was issued to you for the first payment and not the final payment?

A. It might be. Let's see. I can get the date and see. That might be. The bill has been paid, though. I know that.

Q364. But you have no recollection when nor did you pay it? A. I didn't pay it.

Q365. Referring to this photograph, Exhibit Y-16, I believe that you testified on direct examination that this dark line indicated where the so-called insulating wall was in the chill room; is that correct?

A. That is correct.

Q366. And that does so indicate? A. Yes.

Q367. And that indicates the height of that wall, too, [1023] doesn't it?

A. Well, the wall went up to the ceiling. We have testified to that.

Q368. And that dark line does not run up to the ceiling, does it?

A. Why, sure. It is right on the ceiling. There is your ceiling. It couldn't be any place else but on the ceiling.

Q369. Is there any line on the side wall?

A. Well, there is a little mark there on the side wall, right along there (indicating).

(Deposition of Fred L. Trullinger)

Q370. Is there any mark that indicates there was an end wall to that?

A. Here is something here that looks like there might have been an end wall right here. See this in her (indicating)?

Q371. Have you inspected that room to determine whether or not those lines make any such indication or not?

A. No. I told you that before.

Q372. You don't know, then, whether that photograph or any of those lines indicate any such wall, do you?

A. Well, I say it looks like—from the appearance it looks like that is where the wall was.

Q373. You are guessing that that might have been it, then; you have never checked it; isn't that correct? [1024]

A. That is correct.

Q374. Do you know who did the work of moving the Carrier diffuser from the chill room into the locker room?

A. The Western Engineering. Mr. Shapley, I think, did the work.

Q375. Do you know at what temperature the locker room is kept at the present time?

A. Right near zero; sometimes four above and sometimes down to zero. Today it might have been six above zero. It was held as close to zero as we could hold it.

Q376. It might have been considerably higher than that today, might it not?

A. As hot as it is today it might have been different. I say, you can't tell.

Q377. You haven't seen it?

A. I haven't seen it.

(Deposition of Fred L. Trullinger)

Q378. When is the last time you saw the temperature of the room?

A. I saw the temperature Sunday a week ago.

Q379. What was it then?

A. It was four above zero at that date.

Q380. What time of the day?

A. About noontime.

Q381. Do you know what is referred to in this proposal which you have identified by these words: "This machine is [1025] to be equipped with automatic hot gas defrosting"?

A. I understand what that means, yes.

Q382. What does it mean?

A. It means, as I testified to start with, that the plant was put in that way and the hot gas was changed. They pumped it one way, and they closed the valves and forced the hot gas back through the diffuser to defrost it.

Q383. How was that done?

A. Well, I just told you. They closed the valve.

Q384. What valve?

A. The refrigerant valve. There is two valves; one with the small pipe, which is the hot pipe, and the big pipe, which is the cold pipe. They closed the big pipe and reversed the flow of the refrigerant, the hot gas back through the coils, and that is supposed to do the defrosting.

Q385. Did they do anything else with any other valve?

A. How do you mean?

Q386. When they reversed the flow?

A. Well, they closed one and opened the other. They just reversed it that way.

(Deposition of Fred L. Trullinger)

Q387. And was the compressor still allowed to operate?

A. I wouldn't say that. I don't know. I didn't operate that myself.

Q388. Did you ever see that operated?

A. We have two plants now. [1026]

Q389. I am asking about the Yamhill plant. Did you ever see that operated?

A. I never saw it operated.

Mr. White: Q390. I think you are speaking now of the hot gas defrost system?

A. The hot gas defrost system, yes. I never saw that operated, only I know it didn't work.

Mr. Lyon: Q391. You have two plants now that use the hot gas method of defrosting?

A. Yes.

Q392. Satisfactorily?

A. Very satisfactorily.

Q393. I see. But the hot gas method would not work on this plant?

A. It wasn't built properly, they have discovered. Now we defrost this plant twice a day. That plant was only defrosted once a week, and it wouldn't defrost that way. It just didn't have enough hot gas.

Q394. It didn't have enough hot gas?

A. Our plants today are all automatic. We never touch them. It goes through that cycle itself twice a day, twice every twenty-four hours, it goes through the cycle of defrosting.

Q395. With hot gas?

A. With hot gas. [1027]

Q396. Did you ever determine the temperature rise in the room during any such process of defrosting?

A. Around ten degrees.

Q397. You would get a ten-degree temperature rise in the room during such defrosting?

A. Yes.

(Deposition of Fred L. Trullinger)

Q398. Did you ever measure the temperature of the room, any change in temperature of the room, when you state that you used water to defrost? A. No.

Q399. You don't know whether there was any temperature rise or loss at all? A. I don't know.

Q400. You never tried that out?

A. Nowadays we have automatic registers that register every degree of temperature for the whole week, seven days a week, twenty-four hours a day, so we know we can just go there and we can point to every defrost right down the line.

Q401. That is in the present installation?

A. Yes.

Q402. But you had no such—

A. We had no such installations in those days.

Q403. Nor do you have on the Yamhill job at the present time?

A. Not an automatic defroster. [1028]

Q404. Nor an automatic temperature control?

A. No.

Mr. Lyon: Q405. How many locker plants do you operate or control or own at the present time?

A. Well, I own just one, but my son owns four.

Q406. Two of those use a hot gas method of defrosting. What do the other two use.

A. They are using hot air.

Q407. You use no other system?

A. No other system to defrost.

(Deposition of Fred L. Trullinger)

Q408. You stated that before you made this installation at Yamhill you were acquainted with other locker plants in Oregon and Washington; is that true?

A. Not acquainted with the plants, but I knew of the idea of locker plants. In those days it was a new thing. People didn't know much about it.

Q409. You had never been to any of those plants and inspected them?

A. Oh, yes; I went and looked at them.

Q410. What ones did you look at?

A. I went and looked at one at Ellensburg, Washington, and I looked at one at McMinnville.

Q411. Any others?

A. I don't think so. There was one out at Aurora that I looked at. [1029]

Q412. Any others? A. No, that was all.

Q413. Did you look at one out at Woodland?

A. Woodburn. Not Woodland; Woodburn. That is the Aurora plant. I mean it is just out of Woodburn, toward Aurora. You know that plant along the highway?

Q414. No, I am asking you.

A. Well, I am telling you it is just right out of Woodburn toward the Aurora country.

Q415. Who operates that plant?

A. I don't know.

Q416. Who had operated it that time?

A. I don't know that. I just went and looked at the plant. I don't know what he used for defrosting. I haven't any idea. I didn't know there was such a thing in those days. That was all new to me.

(Deposition of Fred L. Trullinger)

Mr. White: Q417. About when was that, Mr. Trullinger?

A. That was back in 1935, the first part of '36.

Mr. Lyon: Q418. Before this installation was made you did not inspect the plant at the Woodland Locker Company? A. Woodland?

Q. Yes. A. I don't know such a company.

Q419. You don't know such a company. You never inspected an installation made and operated by Mr. Rhodes? [1030] A. Rose?

Q420. Rhodes. A. No.

Q421. You don't know Mr. Rhodes?

A. I don't know him.

Q422. Do you know a man by the name of Bud Sprague?

A. Bud Sprague? No, I don't know him.

Q423. You never saw him?

A. Not that I know of.

Q424. He didn't endeavor to sell you on this particular job?

A. Well, as I said before, there was a number of people trying to sell me, but I don't know who they were. There was the Harris Ice Machine Company; there was the Frigidaire people; that is, at that time it was the U. S. Electric or the U. S.—well, it was this electric company over here on Everett Street. There was several companies that tried to sell us.

Q425. You don't remember Mr. Sprague at all?

A. Sprague?

(Deposition of Fred L. Trullinger)

Q426. Yes.

A. I think I remember that name. I don't know just who he was, but I think he was with the Sunset Electric Company. He put in a quick-freeze plant for me later.

Q427. Where? [1031] A. At Yamhill.

Q428. At Yamhill? A. Yes.

Q429. Where is that with reference to this particular plant? A. The same plant.

Q430. In the same plant?

A. In the same plant, yes.

Q431. In the same building?

A. In the same building.

Q432. Where is that from this particular locker room?

A. That was off to the side. It was built in a separate room entirely, and we put in cold plates, freeze plates, and they supplied the plates and sent the men out to install it. I built the box myself out there.

Q433. How long was that after the locker room was built?

A. Oh, that was several years. It must have been three or four years after the plant was put in.

Q434. Have you explained the full operation that you performed and every step you took in turning on the water that you stated you spread over the diffuser in carrying out those operations?

A. Well, I may have made a misstatement, but I think I covered every move that I made.

Q435. You have covered every move that you made? [1032]

A. I think I did. I am not certain as to that, because, you know, in nine years a fellow like I am can forget. I

(Deposition of Fred L. Trullinger)

might have done something there that I didn't tell about. But so far as my recollection goes, we first turned on the water down at this stop and waste proposition after we closed the door to keep the cold from coming in. We wanted to hold it away from the freezing end as far as we could, so this was set out in the other room, which was not cold. But we wanted to cut off the cold from the locker room, from this machine, when we ran the hot water down through there, because we didn't want it to freeze in there. It wasn't hot water; it was just water. Then the water just naturally ran out the drain pipe. There was nothing to touch there. We would observe that by looking down onto the—we had a peephole; I forgot to tell you that. We did have a hole bored in the wall where we could look in and see what the water was doing on the top. But I am not certain about that, because my recollection is that we looked at the bottom always to see whether it was free of ice. And when it was free of ice at the bottom, why, it was cleared out because it melted from the top down. We have a plant just like that out at Multnomah today that we use hot air. Sometimes the hot air fails to go through. Then we pour cold water by bucket. We pour it in above, and when it melts down through then we look at the bottom on the outside, look through this hole, and when the waste is cleared away then we know that [1033] the thing is free.

The Court: I am a little confused. He said he got on his hands and knees and looked underneath. How could he? There was a wall around there, according to the testimony. He couldn't do that, could he?

Mr. Lewis Lyon: No, your Honor.

(Deposition of Fred L. Trullinger)

Mr. White: As I recall, that point of observation would be in the locker room.

Mr. Lewis Lyon: No, it couldn't be. There was a wall there.

Mr. White: Well, there was a hole in the wall.

Mr. O'Hearn: That is right, your Honor.

Mr. White: And you can look through the hole in the wall and see what is in the unit.

Mr. Lewis Lyon: That hole would not be next to the little triangular piece that he said he moved sideways.

The Court: But they built an insulated wall all around there.

Mr. Lewis Lyon: That is right.

The Court: And had a lever going through there, which they agitated?

Mr. White: Yes, but the unit receives its air from the locker room.

The Court: You weren't here last week. That "yes, but" business belongs to another witness. [1034]

Mr. White: The testimony shows that the unit was placed adjacent to the wall separating the chill room and the locker room. That wall contained openings, one for the reception of warm air, relatively warm air from the locker room into the bottom portion of the diffuser, and another opening from which the cold air was discharged from the diffuser back into the locker room. So, therefore, quite independently of the enclosure, the insulated enclosure referred to, as such, about the unit, it is possible—

The Court: Was that developed by the testimony some place?

Mr. Lewis Lyon: No.

(Deposition of Fred L. Trullinger)

Mr. White: Yes, by Trullinger.

The Court: It hasn't come out yet, up to now. The previous witness testified that he looked through the little diamond opening in the metal side, and if necessary he would look underneath, that he could see the whole length, and it defrosted.

Mr. White: That is right.

The Court: But this witness testified he got down on his hands and knees and looked underneath.

Mr. White: Yes, through, I believe, the air inlet.

The Court: He didn't say through the air inlet. At least, if he did, I don't remember it. I tried to follow his testimony because I was wondering, in view of the testimony concerning this insulated wall—the diagram shows the [1035] insulated wall—how he could do that. But you may proceed.

Mr. Lyon: Q436. You have explained every operation that you performed in carrying out that defrosting operation as you state you performed it?

A. I think that covers the whole thing, except taking hold of this lever. I have told you that, though. I explained that. We moved the lever back and forth in just this way. We moved it quite a while; we would move it over here a while and over here a while. That would throw the water.

Q437. You performed that operation yourself without any help from anybody else?

A. Why would I need any help?

Q438. Well, just answer the question, please. I am not asking you whether you needed any help or not.

A. Oh, I see. Yes, I did it without any help.

(Deposition of Fred L. Trullinger)

Q439. Without any help from anybody else?

A. Absolutely.

Q440. You have told me of every operation you performed?

A. Well, I might have done something else around there, too, that I haven't told you about. I don't know what it was.

Q441. Can you think of anything else that you did?

A. We will put away meat in people's lockers for them, and I built a stepladder one time.

Q442. I mean about carrying out this defrosting operation [1036] that you say you performed.

A. I objected strenuously to their hot gas business, and that is why they had to do this. I did that, all right, because it didn't do the work, the hot gas. Otherwise I think I have covered every move that I made.

The Court: Is there any redirect?

Mr. White: Yes, your Honor. We offer the redirect, without reading it, your Honor.

The Court: Without reading it?

Mr. White: Yes, your Honor.

The Court: Very well.

Redirect Examination

By Mr. White:

Q443. Mr. Trullinger, you were questioned on cross examination about looking into the unit to observe the coil or the fins, and specifically with respect to the presence or absence of any ice on them; is that right?

A. Yes.

(Deposition of Fred L. Trullinger)

Q444. Do you recall looking into the unit when water was flowing down?

A. Yes. You saw the water come down through when you looked underneath.

Q445. And what effect on that water would the fan that you have spoken of have?

A. The what? [1037]

Q446. The fan. What effect on the water would that fan have? A. Well, the fan wasn't moving.

Q447. The fan wasn't moving? A. No.

Q448. Why not?

A. Well, we would shut it down. The fan was all shut down. The refrigerant, the freezing part, that was all shut down. We would just shut the machine down. I am talking about defrosting. We used the water. That was all there was to that. The fan wasn't operating nor neither was the plant itself. In defrosting you closed that down always, every time. All the plants do that.

Q449. When was the fan shut down?

A. Well, it was shut down before we started to use the water.

Q450. On your answer to a question on cross examination you stated, as I recall, that you may have been incomplete in your answers concerning this operation. There seems to be some confusion. Will you please start at the beginning of what would be a water defrosting operation and tell us step by step what you did.

Mr. Lyon: That is objected to as already asked and answered several times on direct examination and on his cross examination. [1038]

(Deposition of Fred L. Trullinger)

Mr. White: I wish to clarify the record in this respect.

A. Well, you understand—if I had understood that shutting down the plant had anything to do with the water defrosting—we certainly shut the plant down, but that has nothing to do with the water itself.

Mr. White: Q451. All right. Mr. Trullinger, let's assume that you decided to defrost the coil. Now will you start and tell me step by step just what you did.

Mr. Lyon: That is objected to as not proper redirect examination.

A. The first thing, we shut the plant down; that is, we shut the pump off that pumped the refrigerant through. We shut that down. We threw the switch that runs the fan. The whole thing is dead. Then we start to defrost. Now I started at defrosting; not before, because that is not in the defrosting part at all. Defrosting commences when I go down and turn the water valves on.

Q452. By that you mean in the basement?

A. Down in the basement. I reached up there and turned that.

Q453. All right. Then what do you do or what did you do after that?

A. Went up and took ahold of this lever and moved it as the water ran down through, and it melted the ice off.

Q454. For approximately how long did you do that? [1039]

A. I think it took about twenty-five or thirty minutes. That is about the usual time, if I remember right. Sometimes it took more time. I know with the air we would give it sometimes more than that.

(Deposition of Fred L. Trullinger)

Q455. Then what did you do after you finished operating the spray pipe?

A. Well, we closed the spray pipe off and started up the machine and let it run.

Q456. You had to go back to the basement to close it off? A. Oh, yes.

Q457. Then what did you do after you closed the valve?

A. Well, we went up and opened this door so the air would pass through and turned on the machine.

Q458. Now, you spoke formerly of letting the water back out of the pipe. When was that done?

Mr. Lyon: That is objected to as leading.

A. When we closed the valve downstairs. We went down and closed the valve, and it automatically leaked out. We didn't do anything there. That stop and waste works automatically.

Q459. Now the water drainage to which you refer was accomplished by what part of the valve as we see it in Exhibit Y-15? A. Right here (indicating).

Mr. Lyon: That is objected to as leading and suggestive [1040] and not proper redirect examination; grossly leading.

Mr. White: Q460. Will you mark the part to which you have just referred by the letter "V", please.

A. (Witness marked on photograph as requested.)

Q461. Now you say that that was opened to let the water out?

A. It opens automatically. When you close the valve the waste always opens. That is automatic. It won't open until you do close the valve.

(Deposition of Fred L. Trullinger)

Q462. Now counsel in the cross examination referred to what appears to be a hole.

A. That is this hole here (indicating).

Q463. That is this hole?

A. I don't think he referred to that. I didn't so understand it.

Q464. Now that hole appears where with relation to this elbow immediately beyond the stop and drain valve?

Mr. Lyon: That is objected to as not redirect examination.

A. I think that this is it right through here: and I think, as a matter of fact, that the drain pipe came through the same hole. If you will notice, that is a big long hole for two pipes.

Q465. For two pipes?

A. Yes, the drain pipe. It came down—we didn't want to have too many holes through the floor, because we would let [1041] the cold out, so that was all insulated.

Q466. Now, you have spoken of two drain pipes.

A. This is the pipe that sent the water in, and the drain pipe is this one that is shown over here, coming out.

Q467. The pipe that sent the water in there, that sent the water in to the spray pipe; is that right?

A. That is right.

Q468. And the other pipe drained the water out?

A. That is right.

Mr. Lyon: That is objected to as leading.

The Witness: It still does, even with the air.

Mr. White: I should like to offer as Plaintiff's Exhibit Y-19 the ledger, and particularly page 184 of the

(Deposition of Fred L. Trullinger)

same, to which the witness has previously referred in his testimony. One further question regarding this:

Q469. Were these entries made at the time when the transactions which they represent occurred?

Mr. Lyon: That is objected to as leading, grossly so; not redirect examination.

A. They were, approximately.

Mr. Lyon: Are you offering this ledger at the present time?

Mr. White: Yes.

Mr. Lyon: If you are, I will state my objection to it. I didn't understand you were offering it. I object to it on [1042] the ground it is incompetent, irrelevant and immaterial; that there has been no foundation laid for the offer; merely a self-serving declaration, and not a document kept in the regular course of business.

Mr. White: The witness has testified that—

Mr. Lyon: There is no use arguing it.

Mr. White: —the notations were made by him in his handwriting at the time of the transactions which they represent.

(The ledger above referred to, at page 184, was thereupon marked by the Notary Plaintiff's Exhibit Y-19 for identification.)

Mr. White: Anything further?

The Court: Is there any recross?

Mr. Lewis Lyon: Yes, your Honor. I will offer the recross examination. There may be some particular points which I desire to call to your Honor's attention, without reading it all, particularly the proposition on page 91, be-

(Deposition of Fred L. Trullinger)

ginning with question 475 concerning the draining of the unit. The question was:

“Q. You didn’t have to wait for the water to drain out?

“A. No.

“Q. You just turned the machine right on?

“A. Turned the machine right on as soon as we knew the water stopped.” [1043]

Also, the answer:

“Sometimes it took twenty minutes to defrost; sometimes it took fifteen minutes; whatever it took.”

I believe anything else that is material in the recross examination can be referred to on argument, your Honor.

Mr. White: In the recross examination, your Honor. I would like to read one question and answer which preceded that which Mr. Lyon read.

The Court: All right.

Mr. White: Q471 on page 90:

“Q. You have stated that before you put this insulating wall up here that the structure was unsatisfactory and you could not defrost; is that correct?

“A. We could defrost. No; I didn’t say that. We could defrost, all right; but it froze the meat in there. It got cold in there between defrosts all the time. It was too cold. We didn’t want it so cold in the cool room, so we put in this insulation to stop that.”

Mr. White: And then we also offer the redirect examination on page 94.

The Court: All right.

(Deposition of Fred L. Trullinger)

Recross Examination

By Mr. Lyon:

Q470. How long was it after you said that you turned off the fan and the refrigerating machine, as you have expressed it, [1044] before you turned on the water?

A. Oh, I would say maybe a minute. It doesn't take but a moment to go downstairs and turn it; we could do it in a minute.

Q471. You have stated that before you put this insulating wall up here that the structure was unsatisfactory and you could not defrost; is that correct?

A. We could defrost. No; I didn't say that. We could defrost, all right; but it froze the meat in there. It got cold in there between defrosts all the time. It was too cold. We didn't want it so cold in the cool room, so we put in this insulation to stop that.

Q472. How long was it after you stopped the water before you turned the machine on again?

A. Well, it wouldn't be but a few minutes, because we didn't want to leave the machine standing still any longer than we had to.

Q473. How long was it, actually?

A. Oh, I would say a minute.

Q474. Just as quickly as you could, or didn't you leave time for the water to drain out?

A. The water would run right out. The water was going out just as fast as it would drip down; it went right down the pipe and out below. There was no stoppage of the water.

Q475. You didn't have to wait for the water to drain out? [1045] A. No.

(Deposition of Fred L. Trullinger)

Q476. You just turned the machine right on?

A. Turned the machine right on as soon as we knew the water stopped. When the water stopped we knew she was defrosted.

Q477. How long did it take the water to get out? That is what I am trying to ask you.

A. Sometimes it took twenty minutes to defrost; sometimes it took fifteen minutes; whatever it took.

Q478. Did you ever time the period of time?

A. Maybe not every time, but we defrost nowadays in about fifteen or twenty minutes. It is the same in all plants. It doesn't take long.

Q479. You defrost now not by using water, do you?

A. No, we use hot air, but even with air it takes about fifteen or twenty minutes to pull that air out to defrost.

Q480. You have no recollection or you never timed the water defrosting operation then?

A. Well, if I did I have forgotten. It is a long time ago.

Q481. It is your recollection that it takes just as long to defrost with gas as it did for you to carry on the defrosting operation that you say you performed at Yamhill?

A. We didn't have gas. We didn't use gas. It didn't [1046] work; it didn't defrost.

Q482. I mean at the present time where you are defrosting with gas, it takes just as long?

A. That is automatic. No, I wouldn't say that. The gas, I think, takes possibly fifteen or twenty minutes; maybe only ten minutes. It comes on and off, and we never know that.

(Deposition of Fred L. Trullinger)

Mr. White: This line of examination is objected to as incompetent, irrelevant and immaterial. Any comparison between present-day methods of hot gas defrosting and the water defrosting system to which the witness has testified is entirely irrelevant.

Mr. Lyon: Q483. Can you say that it takes longer or greater or less time to defrost using hot gas than it does with the water?

Mr. White: Same objection.

A. I couldn't say.

Mr. Lyon: Q484. You never timed the water?

A. We just did it until it was done. One day it might take a long time, and the next day it might not take near as long.

Q485. How often was the plant defrosted using water?

A. When we started, ^{about once a week.} because we had very few cus-

Q486. About once a week? A. Yes.

Q487. You got a satisfactory operation of the plant by [1047] defrosting once a week?

A. When we started, because we had very few customers. Today we have to defrost every other day, with the load we carry.

Q488. How often do they defrost using the hot air method now? A. Oh, every other day.

Q489. Every other day. They don't have to do it any oftener than every other day?

A. Oh, they might do it this kind of weather every day.

Q490. Do you know whether they do or not?

A. I know they do up here at our big plant here in town.

(Deposition of Fred L. Trullinger)

Q491. But you don't know when they defrost down there? A. No, I never saw them defrost.

Q492. You never saw them defrost?

A. Oh, I have seen them defrost, but what I mean, I am not down there during the week. I go down Sundays. That is the day they don't defrost.

Q493. They don't defrost on Sundays?

A. Oh, they may in the morning before I get there.

Q494. But you haven't seen them? A. No.

Mr. Lyon: That is all.

Redirect Examination

By Mr. White:

Q495. You are speaking now of the defrosting [1048] that you have not actually seen; that is, the present warm air defrosting? A. Yes, that is right.

Mr. White: That is all.

Mr. Neave: Your Honor, I was thinking about a recess. We could probably save time by going over until tomorrow morning.

The Court: You have just two more depositions?

Mr. Neave: I think there are three.

The Court: Two or three depositions. All right. That will be your case, then?

Mr. Neave: No, we will have two witnesses.

The Court: Experts?

Mr. Neave: One of them is, yes.

The Court: All right. We will recess until 10:00 o'clock.

(Whereupon, at 4:35 o'clock p. m., September 24, 1946, an adjournment was taken until 10:00 o'clock a. m., September 25, 1946.) [1049]

Los Angeles, California, September 25, 1946, 10:00 o'clock A. M.

The Court: Ex parte?

The Clerk: No ex parte, your Honor. Further trial.

The Court: Proceed:

Mr. White: At this time we offer the direct examination of C. W. Eustice, and from that direct examination we have certain excerpts for reading into the record.

The Court: Very well.

Mr. White: First with reference to the matter of temperature conditions, page 103, starting with Question 68:

"Q68. Do you know what was the temperature in that room during the time the water defrost system was in use?

"A. I couldn't state that I know exactly, but we try to maintain it below ten above zero."

The Court: What is that room?

Mr. White: The preceding question, 66, your Honor, identifies that room as the locker room.

The Court: Now let me see if I understand the testimony up to now.

There are three rooms: there is the chill room, the locker room and the compartment where the freezing unit was.

Mr. White: That is correct, and we are here speaking of the temperature conditions existing in the locker room.

"Q69. Do you know whether you succeeded in maintaining [1054] it below ten?

"A. I know we did.

(Deposition of C. W. Eustice)

"Q70. How do you know?

"A. Well, because I watched it every day.

"Q71. Did that temperature condition exist while the water defrost system to which you have referred was in use?

"A. It did."

Now relative to the time that the water defrost was installed, referring to pages 105 to 109, starting at Question 82 on page 105:

"Q82. Did you use any other defrosting means for that Carrier unit during that time?

"A. No.

"Q83. Mr. Eustice, do you have any record here that will show when lockers in the locker room at the time the water defrost system was first used were made available to your customers?

"A. Yes.

"Q84. Will you produce that record, please. First, will you state what is the book which you have now opened.

"A. Well, it is a book containing the rentals of lockers which we have here.

"Q85. By whom were the entries made in this book?

"A. They were kept by me.

"Q86. Solely? [1055]

"A. Only, yes.

"Q87. The entries are in your handwriting?

"A. Yes, sir.

"Q88. Where has this book been in your possession?

"A. Right here in the store.

"Q89. For how long?

"A. 1936.

(Deposition of C. W. Eustice)

“Q90. And in your custody?

“A. Yes, sir.

“Q91. Referring to the book, will you indicate typical entries showing your making available to customers lockers in the locker room.

“A. Well, this particular locker here, No. 20, George Mayhew.

“Q92. You are now referring to page 12 of the book?

“A. Locker No. 20. He had originally signed up, on which he got a credit of a dollar for signing up. And that locker at the time was an eight-dollar locker, and he put merchandise into the locker at that time.”

The court's attention is directed to the fact that we are here referring to Exhibit 20.

Mr. Lewis Lyon: Where are you referring to Exhibit 20?

The Court: Yes, I have it. Page 184.

Wait a minute. Page 12 of this other book, George Mayhew, is that right? [1056]

Mr. White: That is correct.

The Court: Very well.

Mr. White: Continuing:

“Q93. On what date was that?

“A. That was November 21, 1936, at which time he also paid the locker rental.

“Q94. Do you have other similar entries?

“A. Yes. I can take this one here on page 83. On November 11th, that is when the locker was installed, and it was charged against the party, B. F. Laughlin.

“Q95. November, 1936?

“A. Yes. But he paid for the locker in January; January 22, 1937.

(Deposition of C. W. Eustice)

"Q96. What do you mean, that he paid for the locker then?

"A. He paid for the rental of the locker.

"Q97. Does anything in that entry indicate that the customer was actually then using the locker?

"A. Yes.

"Q98. As of what date?

"A. January 22, 1937.

"Q99. Will you find one or two more entries, please.

"A. Well, here is a locker on page 88. The locker renter was J. S. Perkins, and he purchased the locker in January 1, 1937, and he paid for it on January the 21st, 1937.

"Q100. Do the payment dates have any significance with [1057] relation to the actual use of the lockers containing food?

"A. Well, it is pretty hard to say, a question of that kind. But nobody is going to put up any money unless they use a locker, and I am sure that everybody, when they paid this locker rent here on January 21, 1937—

"Q101. You are referring to Mr. Perkins now?

"A. Yes. He had some kind of merchandise to be frozen in the locker.

"Q102. Then was it or was it not your regular custom to make and receive these rental charges at the time the lockers actually went into use?

"A. Yes. We collected the money at the time that they took possession of the locker.

"Q103. When were the transactions in this book entered by you, the various entries which we see?

"A. Every month we would make charges against the locker and also enter the credits.

(Deposition of C. W. Eustice)

“Q104. You personally made those entries?

“A. Yes.

“Q105. Is it true that the book contains entries of a generally like character for various customers?

“A. For all customers.

“Q106. For all customers who used the locker room; is that correct?

“A. That is correct [1058]

“Q107. At the time these entries to which you refer were made, what defrosting system, if any, was used in the Carrier unit?

“A. The water system was used, as far as I know, at the time that I pointed out these items.

“Q108. You were here all the time?

“A. Yes, I know that they were used.

“Q109. When you say ‘they were used’—

“A. I am referring to the lockers that I spoke of here, those three lockers that I spoke of, the water system was in use.

“Mr. White: I wish to have this book to which the witness has just referred, and which is indicated on its binding as ‘Ledger,’ marked for identification as Plaintiff’s Exhibit Y-20.

“(The document referred to was marked Plaintiff’s Exhibit No. 20 for identification.)”

That is all.

Mr. Lewis Lyon: We will offer the cross examination of Mr. Eustice. There are certain points to which I desire to direct the court’s attention particularly, first of which appears on page 110, and I read beginning with Question 114, with this explanation: Prior to the time

(Deposition of C. W. Eustice)

that Mr. Eustice took the stand I called at this so-called Yamhill locker room and talked with Mr. Eustice, together with Mr. Jarvis. [1059]

"Q114. Isn't it a fact that you told me yesterday that the reason you changed this system over to the hot air was because the water defrost was unsatisfactory?

"A. This is the reason I told you that—

"Q115. First, you told me that, didn't you?

"A. Let's get along here.

"Q116. Yes, but first you told me that?

"A. Yes, I said it was unsatisfactory."

Continuing with Question 147 on page 115:

"Q147. I will put the question this way: Isn't it a fact, Mr. Eustice, that you told Mr. Jarvis and myself yesterday that you did not pay for this system until after it was converted to a hot air system for defrosting?

"Mr. White: Just a moment, counsel. When you say 'this system,' what system do you mean?

"Mr. Lyon: I mean this locker system, the whole system.

"Mr. White: Are you including the refrigerating equipment?

"Mr. Lyon: Yes.

"Mr. White: All the refrigerating equipment?

"Mr. Lyon: The Carrier unit.

"Mr. White: As it exists today?

"Mr. Lyon: As it exists today.

"A. We didn't pay for this system until we were satisfied that the Carrier system that we had installed here

(Deposition of C. W. Eustice)

main- [1060] tained the right temperature. As far as the water system was concerned or the hot air was concerned, that didn't enter into the thing. It was just a matter of paying for the refrigeration system that I told you yesterday.

"Q148. Well, you told me that you didn't pay for it because it was unsatisfactory, and then you told me that it became satisfactory when it was changed over to a hot air system; isn't that correct?

"A. I told you it was a better system after. I never told you it wasn't a good system before.

"Q149. You told me it was unsatisfactory?

"A. It was unsatisfactory, yes."

That is all the part of the cross examination that I desire to call to your attention.

Mr. White: I would like to read from the cross examination on page 114, starting at Question 144:

"Q144. It is also true, Mr. Eustice, that you told me yesterday that you never paid for this system because it was unsatisfactory; isn't that correct? You told me and Mr. Hy Jarvis down here that?

"A. I said we didn't pay for the system until we thought it was in workable order.

"Q145. That is, you didn't pay for it until after it was changed over to the hot air system?

"A. No. No, I didn't say that. [1061]

"Q146. Isn't that true?

"A. No, it was paid before."

(Deposition of C. W. Eustice)

I now offer the redirect examination and will read starting at the bottom of page 116, Question 154:

“Q154. Will you explain fully what you mean in stating that the system was not satisfactory.

“A. Well, when we defrosted with the water it would take off the frost on the coils, all right, but it would leave a film of water on it, and then we would go back into operation and it would freeze that film of water on the coils, and in a short time it would rebuild up again.”

That is all.

The Court: While you are on these depositions, I do not recall whether or not there was anything read into the record yesterday indicating the time when the insulated wall was built around the refrigerating unit.

Mr. Lewis Lyon: There isn't anything in the record to establish it, your Honor.

The Court: I remember the man who was testifying who did not remember when it went out.

Mr. Lewis Lyon: There isn't anything that was testified to as to when it went in.

The Court: Indicating it was soon or some time?

Mr. White: That is correct, your Honor, shortly after.

The Court: Shortly after the unit was installed. I got [1062] the impression—I do not know whether it is right—that that was done before he made the final payment. Now I do not know whether there is anything in the record to substantiate that or whether I am drawing an inference.

Mr. White: We will clarify that, your Honor.

C. W. EUSTICE,

was thereupon produced as a witness in behalf of the plaintiff herein and, having been first duly sworn by the Notary Public, was examined and testified as follows:

Direct Examination

By Mr. White:

Q1. Mr. Eustice, you are a resident of Yamhill?

A. Yes.

Q2. For how long have you been residing in Yamhill?

A. Thirty-six years.

Q3. Is it true that you are associated with Fred L. Trullinger in the business of operating the store and locker plant in which we are present here today in Yamhill? A. I am.

Q4. For how long have you personally been engaged in the operation of the premises and in what capacity?

A. Well, since 1917 I have been manager of the store.

Q5. You have been the manager of it?

A. Yes. [1063]

Q6. Have you had anything to do with the equipment installed in the plant? A. Yes.

Q7. Have you had anything to do with any refrigeration equipment here installed? A. Yes, sir.

Q8. What has been your familiarity with such equipment?

A. What do you mean by that, Mr. White? Whether I know anything about refrigeration?

(Deposition of C. W. Eustice)

Q9. No, I mean who has supervised the maintenance and operation of this equipment.

A. Well, I have supervised the maintenance, but putting it in, why, it was a joint proposition between Mr. Trullinger and me.

Q10. With what regularity have you been here on the premises since 1917?

A. Practically every day and Sundays.

Q11. Does this plant have a locker room?

A. Yes, sir.

Q12. It now contains approximately how many individual lockers? A. Practically four hundred.

Q13. Is there a Carrier diffuser unit in that room?

A. Yes.

Q14. Do you have a pre-cooling or chill room? [1064]

A. Yes.

Q15. Is it a fact that it is directly adjacent to the locker room? A. Yes.

Mr. Lyon: I think we ought to let the witness testify. I object to the leading character of the examination.

By Mr. White:

Q16. Mr. Eustice, have you in past years used a system employing the Yamhill city main water for defrosting coils in this Carrier diffuser unit?

Mr. Lyon: That is objected to as leading; grossly so.

A. Yes, sir.

By Mr. White:

Q17. Where was this Carrier unit when the water defrosting system and equipment was used?

A. It was in the pre-cooler.

(Deposition of C. W. Eustice)

Q18. How many different systems, if you know, have you employed here using water for defrosting the coil in this Carrier unit?

Mr. Lyon: That is objected to as leading.

A. Just one.

By Mr. White:

Q19. That is the sole water defrosting system that has been in operation here; is that true?

Mr. Lyon: Same objection. [1065]

A. Yes.

By Mr. White:

Q20. Is that system still in use? A. No, sir.

Q21. Are all the parts of that water defrosting equipment still in existence?

Mr. Lyon: That is objected to as leading.

A. I don't know.

By Mr. White:

Q22. Do you know whether the system was dismantled? A. Yes.

Q23. Do you know whether there are certain remaining parts here in the plant?

A. Yes, there is.

Q24. Do you know where any other of the dismantled parts were put?

A. Well, they were stored in the basement and later disposed of.

Q25. Do you know what happened to them?

A. Well, Mr. White got the handle, a part of the gear, or some part of it.

(Deposition of C. W. Eustice)

Q26. Do you know of the existence today of any other parts other than what may still remain here and the part to which you just referred?

A. I do not. [1066]

Q27. Is it a fact that in April of this year you permitted and directed Messrs. Hulse, Broms, Trullinger and myself to search for all missing parts in the basement?

Mr. Lyon: That is objected to as leading and calling for hearsay testimony. Certainly the defendant and cross-complainant was not here at any such purported inspection.

A. Yes, sir.

By Mr. White:

Q28. Is it a fact that in your presence the search was made by the parties named in the preceding question, and that I showed you a short piece of pipe, one end of which was pivotally connected to an elongated metal strip with a handle on its end?

Mr. Lyon: That is objected to as grossly leading.

A. Yes, sir.

By Mr. White:

Q29. Have you personally searched for any missing parts of that system?

A. Yes, on April 3rd. That was the only time.

Q30. Did you find any parts other than those to which I have referred? A. I did not.

Q31. Do you know Mr. Anton Broms?

A. Yes, sir.

Q32. When he installed this plant, in 1936? [1067]

A. In 1936, when he installed this plant.

(Deposition of C. W. Eustice)

Q33. When you say "installed this plant" you mean what? A. This locker system.

Q34. And by the locker system you mean generally what component parts?

A. Well, the motors and compressors and everything; the Carrier and blowers and water defrosting. The whole thing in general.

Q35. Did Mr. Broms have any connection with that work? A. What do you mean?

Q36. The installation to which you referred.

A. Yes, he had charge of it.

Q37. Was he here on the premises?

A. He was.

Q38. Do you know Mr. C. W. Hulse?

A. Yes, sir.

Q39. When did you make his acquaintance?

A. When he sold us the equipment.

Q40. The equipment being the refrigeration equipment here? A. The Carrier system.

Q41. When was your first knowledge of the water defrosting equipment to which you have previously referred? A. When it was put in, you mean?

Q42. Yes.

A. When we installed the system. It was installed at [1068] the time we put in the system.

Q43. Were Messrs. Broms and Hulse connected with the installation of that system?

Mr. Lyon: That is objected to as leading.

A. Hulse was the salesman. He had no active part in it. Broms installed it.

(Deposition of C. W. Eustice)

Q44. But was Mr. Hulse present here at the time?

A. He was here at different times while the system was in use.

Q45. And what about the time of its first installation?

A. Well, I imagine it would be in October.

Q46. No, I mean was he here at the time of its first installation? A. Yes.

Q47. Mr. Eustice, I show you a photograph marked Plaintiff's Exhibit Y-18 for identification and ask you if you are familiar with what is there shown.

A. Yes; I recognize that.

Q48. What is it, please?

A. Well, the Carrier system, food lockers and the turkey.

Q49. Is that the Carrier unit now in the locker room?

A. Yes, sir.

Q50. Will you explain your familiarity with that turkey?

Mr. Lyon: That is objected to as immaterial, absolute- [1069] ly.

A. Well, that turkey was frozen in our locker system as one of the first products that we froze, and I marked it on November the 11th, 1936.

By Mr. White:

Q51. Is that the date which appears on the label in the photograph? A. Yes.

Q52. Is that the turkey now in the locker room?

A. Yes, sir.

Q53. And is that dated label now on the turkey?

A. Yes, sir.

(Deposition of C. W. Eustice)

Q54. Who placed the turkey in the room?

A. I did.

Q55. You did? A. Yes, sir.

Q56. Where has it been since November 11, 1936?

A. It has been in our locker room.

Q57. Constantly?

A. All with the exception of a month.

Q58. And where was it then?

A. It was in Amity, when Mr. Trullinger's son installed a locker system down there. We took it down there to show the keeping of the locker system.

Q59. Did you take it down there? [1070]

A. Yes, I took it down.

Q60. Did you bring it back?

A. No. Mr. Lorenzen brought it back the man that had charge of the locker system at Amity.

Q61. Do you recognize the writing or printing on that tag? A. I do.

Q62. Is that yours? A. Yes, sir.

Q63. Will you describe the condition of that turkey today?

Mr. Lyon: That is objected to as calling for mere opinion evidence; incompetent, irrelevant and immaterial.

A. Well, the turkey is dried out some, but it still holds its shape and body as we put it in there.

Q64. During your operation of this locker plant have you had occasion to observe the keeping qualities of the room? A. Yes, sir.

Q65. And you have inspected meat and produce that has been maintained in the locker room?

A. Yes, sir.

(Deposition of C. W. Eustice)

Q66. Mr. Eustice, approximately what is the temperature in that locker room today?

A. Well, it is a little less than ten; probably nine degrees.

Q67. Fahrenheit? [1071] A. Yes.

Q68. Do you know what was the temperature in that room during the time the water defrost system was in use?

A. I couldn't state that I know exactly, but we try to maintain it below ten above zero.

Q69. Do you know whether you succeeded in maintaining it below ten? A. I know we did.

Q70. How do you know?

A. Well, because I watched it every day.

Q71. Did that temperature condition exist while the water defrost system which you have referred was in use? A. It did.

Q72. And is it true or not that it so existed throughout the time that water defrost system was in use?

A. Yes, sir.

Q73. What type of defrosting system do you now employ? A. Warm air.

Q74. Can you give me your general recollection as to the least time within your memory that that water defrost system remained in operation here?

Mr. Lyon: That is objected to as not a proper method of proof; incompetent, irrelevant and immaterial.

A. I feel that it was in there over a year. Whether it was in a year and a half or—I am sure it was in there over a year. [1072]

(Deposition of C. W. Eustice)

Q75. With relation to November 11, 1936, the date on the turkey, what is your recollection of the length of time of its operation following that date?

Mr. Lyon: That is objected to as leading; grossly so. Also assuming a fact not in evidence.

A. I didn't follow you on that question.

By Mr. White:

Q76. Am I correct in recalling your former statement that the water defrost system was in operation on the date carried by the turkey label?

Mr. Lyon: That is objected to as leading; grossly so.

A. Yes, sir.

Mr. Lyon: And assuming a fact to which the witness has not testified.

A. Yes, sir; it was in operation at that time.

By Mr. White:

Q77. Do you recall whether the water defrost system was completely installed then? A. It was.

Q78. Was it then, in so far as your regard for the system was concerned, or was it not a satisfactory operation?

Mr. Lyon: That is objected to as calling for a conclusion of the witness.

A. It defrosted the system all right.

By Mr. White:

Q79. Then following that time, November 11, 1936, what [1073] is your best recollection as to the least time beyond that date that the water defrost system remained in operation?

Mr. Lyon: Objected to as already asked and answered.

A. I am sure it was in there a year.

(Deposition of C. W. Eustice)

By Mr. White:

Q80. Following that date?

A. Following that date.

Q81. And during that year did the water defrost system operate satisfactorily?

Mr. Lyon: Objected to as calling for a conclusion of the witness.

Mr. White: You may answer.

A. As far as defrosting, it was satisfactory.

Q82. Did you use any other defrosting means for that Carrier unit during that time? A. No.

Q83. Mr. Eustice, do you have any record here that will show when lockers in the locker room at the time the water defrost system was first used were made available to your customers? A. Yes.

Q84. Will you produce that record, please. First, will you state what is the book which you have now opened.

A. Well, it is a book containing the rentals of lockers which we have here. [1074]

Q85. By whom were the entries made in this book?

A. They were kept by me.

Q86. Solely? A. Only, yes.

Q87. The entries are in your handwriting?

A. Yes, sir.

Q88. Where has this book been in your possession?

A. Right here in the store.

Q89. For how long? A. 1936.

Q90. And in your custody? A. Yes, sir.

(Deposition of C. W. Eustice)

Q91. Referring to the book, will you indicate typical entries showing your making available to customers lockers in the locker room.

A. Well, this particular locker here, No. 20, George Mayhew.

Q92. You are now referring to page 12 of the book?

A. Locker No. 20. He had originally signed up, on which he got credit of a dollar for signing up. And that locker at the time was an eight-dollar locker, and he put merchandise into the locker at that time.

Q93. On what date was that?

A. That was November 21, 1936, at which time he also paid the locker rental. [1075]

Q94. Do you have other similar entries?

A. Yes. I can take this one here on page 83. On November 11th, that is when the locker was installed, and it was charged against the party, B. F. Laughlin.

Q95. November, 1936?

A. Yes. But he paid for the locker in January, January 22, 1937.

Q96. What do you mean, that he paid for the locker then?

A. He paid for the rental of the locker.

Q97. Does anything in that entry indicate that the customer was actually then using the locker?

A. Yes.

Q98. As of what date? A. January 22, 1937.

Q99. Will you find one or two more entries, please.

A. Well, here is a locker on page 88. The locker renter was J. S. Perkins, and he purchased the locker in January 1st, 1937, and he paid for it on January the 21st, 1937.

(Deposition of C. W. Eustice)

Q100. Do the payment dates have any significance with relation to the actual use of the lockers containing food?

A. Well, it is pretty hard to say, a question of that kind. But nobody is going to put up any money unless they use a locker, and I am sure that everybody, when they paid this locker rent here on January 21, 1937—

Q101. You are referring to Mr. Perkins now? [1076]

A. Yes. He had some kind of merchandise to be frozen in the locker.

Q102. Then was it or was it not your regular custom to make and receive these rental charges at the time the lockers actually went into use?

Mr. Lyon: That is objected to as leading.

A. Yes. We collected the money at the time that they took possession of the locker.

Q103. When were the transactions in this book entered by you, the various entries which we see?

A. Every month we would make charges against the locker and also enter the credits.

Q104. You personally made those entries?

A. Yes.

Q105. Is it true that the book contains entries of a generally like character for various customers?

A. For all customers.

Q106. For all customers who used the locker room; is that correct? A. That is correct.

Q107. At the time these entries to which you refer were made, what defrosting system, if any, was used in the Carrier unit?

(Deposition of C. W. Eustice)

Mr. Lyon: Objected to as calling for a conclusion of the witness. [1077]

A. The water system was used, as far as I know, at the time that I pointed out these items.

Q108. You were here all the time?

A. Yes, I know that they were used.

Q109. When you say "they were used"—

A. I am referring to the lockers that I spoke of here, those three lockers that I spoke of, the water system was in use.

Mr. White: I wish to have this book to which the witness has just referred, and which is indicated on its binding as "Ledger," marked for identification as Plaintiff's Exhibit Y-20.

(The ledger above referred to was thereupon marked by the Notary as Plaintiff's Exhibit Y-20 for identification, and the same is attached to and made a part of this deposition.)

The Witness: There may be things in there that I would like to keep.

By Mr. White:

Q110. You are referring to the loose sheets?

A. The loose sheets.

Q111. Are those sheets any part of the transactions to which you have referred? A. No.

Mr. White: You may cross examine. [1078]

(Deposition of C. W. Eustice)

Cross Examination

By Mr. Lyon:

Q112. Mr. Eustice, you changed over this system to the present hot air system, did you not?

A. Yes, sir.

Mr. White: What does counsel mean by "this system"?

Mr. Lyon: This so-called water defrost system.

Q113. When was that done?

A. Well, I can't recall, but it was in 1937 or the first part of 1938.

Q114. Isn't it a fact that you told me yesterday that the reason you changed this system over to the hot air was because the water defrost was unsatisfactory?

A. This is the reason I told you that—

Q115. First, you told me that, didn't you?

A. Let's get along here.

Q116. Yes, but first you told me that?

A. Yes, I said it was unsatisfactory.

Q117. All right. A. All right.

Q118. Now during the time that this was changed over how long did it take to change this system to a hot air system and move the Carrier unit from the chill room over into the locker room? How long did it take to change over to the hot air system? [1079]

A. Well, I think it would take maybe four or five days.

Q119. And what means did you use to maintain the locker room temperature during that period of change-over?

A. Our insulation is so that we didn't make any change at all.

(Deposition of C. W. Eustice)

Q120. How much did the temperature of the locker room raise during that period of four or five days that this change-over was being made?

A. Probably ten degrees.

Q121. Only ten degrees? A. Yes.

Q122. Up to what? A. Up to twenty.

Q123. You measured it, did you, at that time?

A. Well, I could watch it, yes.

Q124. You watched the temperature, and it only raised ten degrees? A. Ten degrees.

Q125. How big is that room?

A. I couldn't tell you exactly.

Mr. White: Just a moment. Let's have the witness' answer.

Mr. Lyon: "I couldn't tell you."

Mr. White: Did you not use the word "exactly"?

A. I couldn't tell you—well, that is as far as I [1080] went on that question.

By Mr. Lyon:

Q126. Do you know what the water pressure is on the water system here?

A. About sixty-five pounds.

Q127. That is, during 1936?

A. Just the same.

Q128. Just the same. The basement of this store is used as a general storage place for merchandise, is it not?

A. Yes, sir.

Q129. What kind of merchandise have you kept in there during 1936 and at the present time?

A. We have kept hardware and groceries.

Q130. A general grocery line?

A. General grocery line.

(Deposition of C. W. Eustice)

Q131. Including cereals, and so forth?

A. Never carried cereals—anything that wouldn't take moisture up. We carried some canned goods, soaps, but no cereals.

Q132. What else?

A. And hardware, building paper—I guess that would cover it all—pipe, steel pipe, galvanized pipe.

Q133. Bottled goods?

A. Some bottled goods; syrups, probably.

Q134. Any barreled goods? [1081]

A. Vinegar and oil.

Q135. Any other barreled goods?

A. No, not that I know of.

Mr. White: You are speaking now of storage in the basement?

Mr. Lyon: That is right.

Q136. How many lockers would you say were rented during this period of time when the unit was being defrosted with water?

A. About two hundred fifty.

Q137. During the entire period of time?

A. Yes.

Q138. You had records of food spoilage during that time, did you not? A. I never did.

Q139. You never had any?

A. Never had any at any time.

Q140. Never had anything spoil in the locker?

A. Not in the locker; no.

(Deposition of C. W. Eustice)

Q141. It is your recollection that this water defrost system was installed at the time the system was originally put in; is that correct?

A. No. They installed a gas system to defrost, but they figured that it didn't work, and I didn't know how or why or when—how it was worked, but before we put in any [1082] merchandise the water system was installed.

Mr. White: May I interrupt to clarify that answer.

Q142. When you say "they," Mr. Eustice, "they figured"—

A. I mean the engineers.

By Mr. White:

Q143. The people putting it in?

A. The people putting it in.

By Mr. Lyon:

Q144. It is also true, Mr. Eustice, that you told me yesterday that you never paid for this system because it was unsatisfactory; isn't that correct? You told me and Mr. Hy Jarvis down here that?

A. I said we didn't pay for the system until we thought it was in workable order.

Q145. That is, you didn't pay for it until after it was changed over to the hot air system?

A. No. No, I didn't say that.

Q146. Isn't that true?

A. No, it was paid before.

Mr. White: Just a moment. When you say "this system" are you referring to—

Mr. Lyon: To the entire locker system.

Mr. White: Are you referring to the system employing water for defrosting?

(Deposition of C. W. Eustice)

Mr. Lyon: We are referring to the entire locker system. [1083]

Mr. White: Counsel will have to clarify the question, then, because the witness has testified that different equipments were installed during the entire period of use of this locker room. Now are we referring to the time when the water defrost system was in or are we referring to a time when warm air was used for defrosting?

By Mr. Lyon:

Q147. I will put the question this way: Isn't it a fact, Mr. Eustice, that you told Mr. Jarivs and myself yesterday that you did not pay for this system until after it was converted to a hot air system for defrosting?

Mr. White: Just a moment, counsel. When you say "this system," what system do you mean?

Mr. Lyon: I mean this locker system, the whole system.

Mr. White: Are you including the refrigerating equipment?

Mr. Lyon: Yes.

Mr. White: All the refrigerating equipment?

Mr. Lyon: The Carrier unit.

Mr. White: As it exists today?

Mr. Lyon: As it exists today.

A. We didn't pay for this system until we were satisfied that the Carrier system that we had installed here maintained the right temperature. As far as the water system was concerned or the hot air was concerned, that didn't enter into [1084] the thing. It was just a matter of paying for the refrigeration system that I told you yesterday.

(Deposition of C. W. Eustice)

Q148. Well, you told me that you didn't pay for it because it was unsatisfactory, and then you told me that it became satisfactory when it was changed over to a hot air system; isn't that correct?

A. I told you it was a better system after. I never told you it wasn't a good system before.

Q149. You told me it was unsatisfactory?

A. It was unsatisfactory; yes.

Q150. Do you know a man by the name of Bud Sprague, also in the refrigeration business?

A. No, I don't think so.

Q151. You never met him?

A. Not as I know of.

Q152. On this job? A. I can't recall him.

Mr. Lyon: That is all.

Redirect Examination

By Mr. White:

Q153. Mr. Eustice, did you, in answer to Mr. Lyon's question, yesterday say to him that the water defrost system which, as you have testified, was used here in the plant, and according to your testimony starting in 1936 and thereafter, did you tell him that that water defrost system was not [1085] satisfactory?

Mr. Lyon: That is objected to as leading; grossly so.

A. I may have told him that it was not satisfactory, but I didn't go any further in telling him, because there was other details to the fact why it was not satisfactory.

Q154. Will you explain fully what you mean in stating that the system was not satisfactory.

A. Well, when we defrosted with the water it would take off the frost on the coils, all right, but it would

(Deposition of C. W. Eustice)

leave a film of water on it, and then we would go back into operation and it would freeze that film of water on the coils, and in a short time it would rebuild up again.

Q155. Did you personally observe the film of water on the coils? A. Sure.

Q156. Did you personally observe the result of the water defrosting operation or the condition of the coil after water defrosting? A. Yes.

Q157. Before water defrosting, I take it, there was an accumulation of ice on the coil or frost?

Mr. Lyon: Objected to as leading.

A. It would be iced, and also it would not take the frost off of the coils.

Q158. Just a moment. My question was— [1086]

Mr. Lyon: Just a moment. Let the witness finish his statement.

The Witness: All right. You fellows get together on that.

Mr. Lyon: Go ahead and proceed with what you were stating.

Mr. White: I move to strike the answer as not responsive to the question.

Mr. Lyon: You can't move to strike your own witness' answer.

By Mr. White:

Q159. Mr. Eustice, in order to clarify this, did you personally observe the condition of the coil just before you started to water defrost? A. I did.

Q160. How did that coil appear?

A. Covered with frost.

(Deposition of C. W. Eustice)

Q161. To what degree?

A. Well, there were fins to allow the air to go through, and that would practically close those air ducts through there.

Q162. Do you know whether that same coil is now in the Carrier unit? A. It still is.

Q163. Did you observe the condition of the coil after the water defrosting?

A. You mean with the water system? [1087]

Q164. Yes. A. Yes.

Q165. How did it then appear?

A. Well, it would take off the frost and the ice particles and bring it down to the coil, the bare coil, with the exception of a film of water that would stand on the coil.

Q166. While the equipment employed this water defrost system to which you have referred, did the system at any time fail to maintain the locker room temperature as you have described them previously in your testimony?

A. No, it always maintained our temperature.

Q167. Was the system then satisfactory from the standpoint of maintaining the desired locker room temperature?

Mr. Lyon: That is objected to as leading; grossly so.

A. Yes, it was satisfactory as far as defrosting was concerned.

Q168. I referred to the maintenance of the locker room temperature at the proper degrees. A. Yes.

Mr. White: That is all.

Mr. Lyon: That is all. [1088]

Mr. White: I will read into the record a stipulation entered into between counsel concerning the photographic exhibits:

“It is stipulated that Mr. Clifford G. Schultz, if called and sworn as a witness, would testify that in August, 1945, he was a resident of Portland, Oregon, and was employed as a photographer by the Photo Art Commercial Studios at 420 Southwest Washington Street, Portland, Oregon; that on August 21, 1945, he, accompanied by H. Calvin White, went to the Trullinger & Eustice Locker Plant at Yamhill, Oregon, and there took the photographs identified in Plaintiff’s Exhibits Y-14, Y-15, Y-16, Y-17, and Y-18, and that he observed the prints of the photographs that were made in said Photo Art Studios on that same day.” [1089]

Mr. Lewis Lyon: Where were you reading from?

Mr. White: I was reading from the Hulse deposition which sets that out. That was on page 43.

Mr. Lewis Lyon: That stipulation was entered into.

The Court: Approved.

Mr. White: A second stipulation, appearing on page 241 of the record following immediately before the notary’s certificate:

“It is stipulated that Mr. S. C. E. Smith, if called and sworn as a witness, would testify that he is and has been the owner and manager of the Congress Hotel at 1024 S. W. Sixth Street, Portland, Oregon, since before 1937 to the present, and that throughout that time all records of the hotel have been in his charge; that today he produced from those records two original registration cards of the hotel, offered and marked Plaintiff’s Exhibits Y-26

and Y-27 for identification, both bearing the dates October 7, 1937, and Exhibit Y-26 the handwritten names R. A. Masterson and Sam Jackson, and Exhibit Y-27 the names Mr. and Mrs. C. W. Hulse, Brown-Johnston Company; that the custom of the hotel has been to require its guests to sign all such registration cards, and that these exhibits, Y-26 and Y-27, are records of the hotel kept in the regular course of its business."

The Court: Approved.

Mr. White: At this time we will offer Plaintiff's [1090] Exhibits Y-4, Y-5, Y-6, Y-7, Y-8, Y-9, Y-14 through and including Y-22, Y-24, Y-26, Y-27.

The Court: That is Y-4, 5, 6, 7, 8, 9?

Mr. White: Then 14 through 22.

The Court: They are admitted.

(The documents referred to were received in evidence and marked Y-4, Y-5, Y-6, Y-7, Y-8, Y-9, Y-14 through Y-22 inclusive respectively Plaintiff's Exhibits.)

[Note: Plaintiff's Exhibits Nos. Y-4 to Y-9, Y-14 to Y-20 and Y-22 will be found in the Book of Exhibits at pages 1226 to 1228, 1231 to 1237 and 1238.]

The Court: What else?

Mr. White: Y-24.

The Court: Admitted.

(The document referred to was received in evidence and marked Plaintiff's Exhibit Y-24.)

[Note: Plaintiff's Exhibit No. Y-24 will be found in the Book of Exhibits at page 1239.]

Mr. White: Then Y-26 and Y-27. Those have been referred to in the stipulation.

The Court: The materiality of 26 and 27 does not yet appear.

Mr. White: No, that is correct, but I believe it will.

The Court: They are all admitted except those two. Do you raise the objection as to the materiality, to those two hotel registrations?

Mr. Lewis Lyon: They have not been shown to be material yet, your Honor.

The Court: I thought maybe you waived your objection.

Mr. Lewis Lyon: No, I think the offer is premature until there is some materiality shown as to those slips, and I [1091] object on that ground.

The Court: All right. The others are admitted as I have indicated. [1092]

Mr. Lyon: I understand you are not offering any of the deposition of Mr. Postlewaite, counsel?

Mr. White: Not at this time.

Mr. Lyon: Are you going to offer it at any time?

Mr. White: No.

Mr. Lyon: I think in order to get the full facts before the court, it is material to offer a portion of that deposition.

I will at this time offer the cross examination of Mr. Postlewaite.

Mr. Postlewaite was a witness called on behalf of the plaintiff. He was an ex-employee of the Electrical Products Corporation. At the time he was called he was doing business under the name and style of Western Engineering Company in Portland. He was an engineer, had been an engineer for the Electrical Products Cor-

poration and testified as to his experience with this so-called Trullinger & Eustice installation at Yamhill, Oregon.

The testimony that I desire to refer to shows several things: One, as brought out by the following testimony, that because of the positioning in use of this so-called Carrier diffuser unit the temperature always raised above freezing, so that there was no freezing problem when or if the device at any time worked satisfactorily, but he also testifies as to the difficulties that they had. [1093]

The Court: All right. You had better read it.

Mr. Neave: I think so.

Mr. Lyon: All right.

The Court: Now, have you fixed the time when he worked there? There are still some times that perhaps are not clear. It may be the counsel can straighten this out in my mind, that is, how long the hot gas system was in there before they put in the water system. Did this fellow have anything to do with the hot gas system, do you propose to show, or with the water system?

Mr. Lyon: He does not testify, and no witness testified, your Honor, as to the time that the hot gas system was used in the locker plant at Yamhill. No witness testified—

The Court: You mean, how long it was used?

Mr. Lyon: How long it was used. There is no witness that testified definitely as to any date of this first proposed change-over.

The Court: Does this fellow have anything to say about it?

Mr. Lyon: No, he doesn't, as to time.

The Court: All right. Go ahead.

Mr. Lyon: I will start reading, beginning with the cross examination, Question 121, page 205:

“Q. You stated, Mr. Postlewaite, that you carried out these operations of turning on the water”— [1094]

The Court: Are you offering his direct examination?

Mr. Lyon: No, I am not, your Honor.

The Court: How can you have any cross examination if there isn't direct examination?

Mr. Lewis Lyon: I think the facts he brings out on cross examination are material in themselves.

The Court: You are offering it then as your direct examination, on behalf of the defendant?

Mr. Lewis Lyon: Yes, I will have to do that.

The Court: All right.

Mr. Lewis Lyon: —at the present time, in view of the fact that plaintiff does not see fit to rely in any way upon the testimony of this witness.

Mr. Neave: That was said, your Honor, before Mr. Lyon determined that he was going to offer any of it.

Mr. Lewis Lyon: Continuing the reading of it, Question 121, at page 205:

“Q121. You stated, Mr. Postlewaite, that you carried out these operations of turning on the water to try to remove the ice from the coils on this Carrier diffuser. How long did you let the water run?

“A. Oh, I timed it as long as fifteen minutes.

“Q122. As long as fifteen minutes. Never any longer?

“A. When the water pressure dropped, yes, I had [1095] to wait longer. I have waited sometimes as long as forty minutes.

(Deposition of Mark A. Postlewaite)

“Q123. And sometimes longer than that, didn’t you?”

“A. Well, I may have and may not. I didn’t note the time.

“Q124. During that period of time the temperature inside of the diffuser raised to practically the temperature of the water, didn’t it?”

“A. Well, no, I don’t think so. It might have. I couldn’t tell you that for sure.

“Q125. You never measured it?”

“A. No, I never measured with a thermometer, no.

“Q126. But you know it raised considerably above freezing?”

“A. It went above freezing when—well, you see, the cold diffuser was inside of the room once and was outside of the room once.

“Q127. Well, it was outside of the room at all times that this water was used?”

“A. Outside of the locker room, yes. If this were the chill room, it is in the chill room here and all exposed; you can walk up there and put your hand on it. When you defrosted that way the sweat just rolled right off of it and it came right up to above [1096] freezing temperature.

“Q128. I mean when it was closed with this wall you put doors—

“A. So you could reach in.

“Q. (Continuing)—in front of the inlet and outlets so that you could close off circulation from the locker room to the diffuser, didn’t you?”

“A. Yes, sir.

(Deposition of Mark A. Postlewaite)

"Q129. And kept the cold air from the locker room going into the diffuser during the time of your spraying water onto the coils?

"A. The door was put on there so that when you were not defrosting the air would not get in there from the locker room, into the space around the cold diffuser.

"Q130. Well, you had doors, inlet and outlet, that closed the wall opening into the diffuser from the locker room, too, didn't you? Or maybe you don't remember that.

"A. Wait a minute.

"There were doors into this insulated room compartment in which the cold diffuser was located, and those doors were always closed except when you were defrosting.

"Mr. Lyon: Q131. And also the diffuser outlet [1097] was connected through an opening in the wall in that cold room, wasn't it?

"A. That is right."

The Court: Isn't there anything to connect up this time? What I am trying to fix in my mind is the date when the insulated wall was put around there, because, as I see it at this stage of the proceedings, the insulated wall is an important part of that apparatus.

Mr. Lewis Lyon: There is no date.

The Court: He testifies here that the doors were in the insulated room compartments, so they must have had the insulated wall when he was there. Is there anything that shows that?

Mr. Lewis Lyon: There is nothing in the record.

(Deposition of Mark A. Postlewaite)

Mr. Neave: We will introduce evidence on that point, your Honor.

The Court: To show how long he was there?

Mr. Neave: No, to introduce—not through this witness, but through another witness—when that insulated wall was placed there.

The Court: Does this witness testify on his direct or cross examination—

Mr. Neave: I can't find it.

The Court: — how long he was working with Electrical Products? [1098]

Mr. Neave: Yes, sir, that is testified to.

The Court: All right.

Mr. Lewis Lyon: (Continuing reading):

“Q132. There was a door to close that outlet placed there, wasn't there, or a door to close that outlet and the inlet? There was both an inlet and outlet in that wall, wasn't there?

“A. Yes, but we didn't close that—I didn't close that door myself.

Q133. You never closed any of those doors?

“A. No, sir.

“Q134. You don't know whether there were doors there or not?

“A. Right now I couldn't tell you, in other words, that there were, because I was not interested in the thing from an experimental point of view. I was interested in seeing if I could get the plant to operate without—

“Q135. What you were doing—

“A. —trying to get the water to defrost. I was trying to get the water defrosting on its own legs.

(Deposition of Mark A. Postlewaite)

“Mr. Lyon: Q136. You were experimenting, weren’t you?

“A. I was trying to prove the operation of [1099] water defrosting.

“Mr. Lyon: Q137. As you stated, you were experimenting with it. That is why you went out there so often?

“A. I didn’t go out there with the idea of experimenting. You haven’t asked me why I went out, so all I can say is I didn’t go out with the idea of experimenting.

“Q138. You did state you went out to try to prove whether it would work or not, didn’t you?

“A. Well, I had already proved—

“Q139. Just answer that question, please.

“A. Well, I can’t answer it ‘Yes’ or ‘No.’ I don’t think I can, because I went out to see why somebody said it didn’t always work.

“Q140. You had those complaints that it didn’t always work?

“A. I had complaints that it didn’t always work.

“Q141. And those complaints came from the operator?

“A. That is right.

“Q142. And that operator was Mr. Eustice?

“A. Yes, sir.

“Q143. And any other operator?

“A. He had a meat cutter there at times. [1100] That fellow is dead now.”

“Q144. ‘You—’ That should be ‘who’—

“Who also complained that it didn’t work at times?

“A. He couldn’t work it at times.

(Deposition of Mark A. Postlewaite)

"Q145. He couldn't make it work?

"A. That is right.

"Q146. Now when is the first time that you saw this device had been removed and completely replaced?

"A. Oh, in the spring of '38.

"Q147. Now after the spring of '38—

"A. The spring of '39 or winter of '38-'39 we changed the water defrost."

The Court: Let me hear the last two questions and answers again. They discovered that it didn't work in the spring of 1938?

Mr. Lewis Lyon: Yes, sir.

Mr. O'Hearn: No, your Honor, he changed it.

The Court: No, he said that, and then he said something else. Let me hear the last two questions and answers again.

Mr. Lewis Lyon: (Reading):

"Q144. Who also complained that it didn't work at times?

"A. He couldn't work it at times.

"Q145. He couldn't make it work?

"A. That is right, [1101]

"Q146. Now when is the first time that you saw that this device had been removed and completely replaced?

"A. Oh, in the spring of '38.

"Q147. Now after the spring of '38—

"A. The spring of '39 or winter of '38-'39 we changed the water defrost.

"Q148. Now after this had been replaced did you continue to go out there at periods of two weeks to a

(Deposition of Mark A. Postlewaite)

month to find out whether the new system was operating or not?

"A. No.

"Q149. You didn't repeat this proposition of going out there every two weeks or a month after that?

"A. No.

"Q150. You are acquainted with Mr. H. T. Jarvis sitting here, are you not?

"A. I have seen him at times."

I will offer it all, but I don't feel it is necessary to read it at this time. Continuing with Question 157:

"Q157. As a matter of fact, Mr. Postlewaite, you do not of your own personal knowledge know that that job was ever paid for, do you?

"A. No, sir. I never handled the money."

Now, I will just offer the rest of the cross examination [1102] at this time, and reserve certain parts of the direct examination, that I may want to offer later, your Honor.

The Court: Very well. It is admitted.

Mr. White: Since the cross examination has been offered, the plaintiff will offer the direct.

The Court: As cross?

Mr. White: As direct.

Mr. Lewis Lyon: As direct, your Honor.

Mr. White: I will read two excerpts, one starting at page 181, at the bottom of the page, Question 6:

"Q6. Were you in 1936 associated with Electrical Products Consolidated?

"A. Yes.

(Deposition of Mark A. Postlewaite)

“Q7. Did you then engage in work having to do with the installation of a locker room plant at the Trullinger & Eustice store in Yamhill, Oregon?

“A. Yes.

“Q8. Do you recall generally the time when you engaged in that installation?

“A. Well, the job sold in the fall, and the equipment was about a week or two in coming. It came from Los Angeles, so that it was not installed immediately after it was sold. I remember the wait. The equipment was installed out there by Tony Broms working for me. [1103]

“Q9. That is Mr. Anton Broms?

“A. That is right.

“Q10. In what capacity did he work for you?

“A. He was an erection man, erection engineer, or if you want to call it erection fitter, a piping service man of that type.”

Now, on page 191, starting with Question 54:

“Q54. Was the unit visible in the chill room when first installed as you have described?

“A. When it was first installed, yes.

“Q55. Do you have any recollection of temperature conditions in that chill room at that time?

“A. Well, the temperature conditions at first were above freezing, just what was desired. At that time the lockers were not all sold, and later as the lockers became sold and the load became more on the cold diffuser equipment the apparent lack of capacity was complained of and the cold diffuser was housed in and insulated.

“Q56. Do you recall having made any observations that would indicate temperature conditions in the chill

(Deposition of Mark A. Postlewaite)

room at the time this diffuser unit was openly exposed in that room?

"A. I know that I set the thermostat at 35 degrees in this chill room. [1104]

"Q57. Do you know whether the chill room temperature was that high?

"A. Yes, I know that at times it was that high.

"Q58. And at this same time was that Carrier ceiling diffuser that you previously referred to in operation?

"A. Yes.

"Q59. Was the installation changed thereafter, to your recollection, while still using water for coil defrosting as you have described?

"Mr. Lyon: That is objected to as leading.

"Mr. White: Q60. You have previously testified that the diffuser unit was housed in and insulated. Will you explain how that housing and insulation was made.

"A. While the cold diffuser was not moved, a wall or insulated partition was built from the common partition wall between the two rooms around the cold diffuser from the floor to the ceiling, making a third room in which this cold diffuser was the only thing located in there. There was no other equipment in there.

"Q61. Was the interior of that third unit-containing room accessible?

"A. Yes. We could not get in there, but we [1105] could open doors and reach in.

"Q62. Did you observe the operation of this system after the unit was housed in as you have described?

"A. Yes.

(Deposition of Mark A. Postlewaite)

“Q63. Did you make observations of temperature conditions in the locker room?

“A. Yes, the locker room controlled temperature—the thermostat was set to operate between 5 and 10 degrees Fahrenheit and did that. I observed it did that.

“Q64. Do you know what, when that temperature existed in the locker room, the temperature was in this third insulated unit-containing room?

“A. I don’t know just what the temperature was, but I do know that water in there froze during operating periods. It must have been considerably below freezing.

“Q65. Where did water freeze in there?

“A. On the sides of the unit, and on the floor where the sprays would splash out, the spray water would splash out through the connections.”

Mr. Lewis Lyon: I should like to continue reading from the point where plaintiff’s counsel stopped.

“Q66. Did you operate this water defrosting [1106] system in the manner previously described after the unit was enclosed within this insulated wall?

“A. Yes, I operated it.

“Q67. Did you observe the results of its operation?

“A. Yes, I know pretty well what I saw there.

“Q68. What did you see?

“A. I saw that as long as the water supply was maintained in the main coming into the building the defrosting was as “Tony” Broms, or Anton Broms, had first anticipated, and that when the water supply was not maintained the defrosting did not occur or the de-icing did not take place, and I had another problem.

(Deposition of Mark A. Postlewaite)

“69. Was the water pressure adequate at times?

“A. It was adequate at times, but sometimes people would use the water on other places in the building and then the pressure would drop and the defrosting or de-icing would not take place, and as a result you could not be sure that ice was off.

“Q70. Would any de-icing take place when the water pressure was down?

“A. ‘It’—that should be ‘If’—If the pressure were reduced enough, other uses were large enough, the de-icing would drop to—did not occur [1107] at all. At other times when the pressure was just partially reduced, why, the de-icing was slow, very slow.

“Q71. But there was de-icing?

“A. As long as there was water there was de-icing.

“Q72. When higher water pressures existed what was the result of the de-icing operation?”

That question was reframed:

“Q73. Is it true that at times the water pressure was higher than on those occasions to which you last referred?

“A. At times there was sufficient water pressure on the mains to force sufficient water into the spray pipe to defrost or de-ice the coils in what I considered a satisfactory time.

“Q74. Did you observe the result of the de-icing operation at those times?

“A. There were times when there was sufficient water pressure that the ice was entirely removed from the coils, sufficiently so to produce a satisfactory cooling operation later.

(Deposition of Mark A. Postlewaite)

“Q75. Mr. Postlewaite, did water freeze at any time within your observation in either the perforated spray pipe or the hose connection with the valve in the [1108] basement?

“A. At one time while checking the time of defrosting the coil I found that the water pressure had been reduced sufficiently that the defrosting did not take place, and at that time I started to put the coil back into operation, trying to prevent the temperature in the locker room from getting too high. At that time the drain valve on the supply line to the cold diffuser was closed, and after the water pressure came back up we tried to open the valve in the supply line, which we did, and the water did not flow, so we had to get a torch and thaw it out.

“Q76. Did you encounter any similar situation at other times and at higher water pressures?

“A. Never—no, I can’t answer that ‘Yes’ or ‘No.’ When the drain valve was opened the water drained out and there was no freezing in the line. When the valve was closed, and there was sufficient water, the operation took place and there would be no freezing in the pipe.

“Q77. And that is true within your personal direct observation of the operation of the system?

“A. I went out there a number of times due to the complaint of the operator trying to check on him [1109] to see if he was defrosting correctly. I think I know more about that because I understand it pretty thoroughly.”

That is the part I wanted to call the court’s attention to at the present time.

The Court: All right. You offer all of the direct and all of the cross now, that is, everybody offers everything?

Mr. White: Yes.

Mr. Lewis Lyon: Yes.

MARK A. POSTLEWAITE,

was thereupon produced as a witness in behalf of the plaintiff herein, and, having been first duly sworn by the Notary, was examined and testified as follows:

Direct Examination

By Mr. White:

Q1. Mr. Postlewaite, you are engaged in business under the name Western Engineering Company at 2105 Southeast Ninth Avenue here in Portland?

A. That is right.

Q2. What is the nature of that business?

A. Well, we engineer, sell, install and service refrigeration equipment, air conditioning equipment.

Q3. How long have you been engaged in that type of business? A. Oh, since 1925. [1110]

Q4. During the course of years from 1925 to the present have you done refrigeration engineering work?

A. That is right.

Q5. Will you indicate briefly the scope and nature of your work?

A. Well, I worked in Los Angeles from '25 to '28 as assistant engineer and as chief engineer for Baker in Los Angeles from '28 to '30, and from '30 to '35 I was chief engineer for Baker in Seattle. I opened their branch here—not their branch, but their shop. I opened their shop, hired their men, and started as foreman there and

(Deposition of Mark A. Postlewaite)

was still foreman until I put a fellow in charge of the shop. From then on, after I left there, I was first in charge of the Portland office for Electrical Products, handling Carrier Corporation products, air conditioning and refrigeration equipment. I went to work for them in September, 1936, and I was with them until the following August, and then I was with Carrier from the following August; that is, August, 1937, to December, 1938. In December, '38, Western Engineering was formed. We have been operating as Western Engineering in this neighborhood ever since.

Q6. Were you in 1936 associated with Electrical Products Consolidated? A. Yes.

Q7. Did you then engage in work having to do with the [1111] installation of a locker room plant at the Trullinger & Eustice store in Yamhill, Oregon?

A. Yes.

Q. Do you recall generally the time when you engaged in that installation?

A. Well, the job sold in the fall, and the equipment was about a week or two in coming. It came from Los Angeles, so that it was not installed immediately after it was sold. I remember the wait. The equipment was installed out there by Tony Broms working for me.

Q9. That is Mr. Anton Broms?

A. That is right.

Q10. In what capacity did he work for you?

A. He was an erection man, erection engineer, or if you want to call it erection fitter, a piping service man of that type.

(Deposition of Mark A. Postlewaite)

Q11. Do you recall the general parts of the Trullinger & Eustice plant in connection with which this system was installed?

A. Well, there were two machines, two ice machines, one ice machine on one floor in the chill room or pre-cooling room and another machine—we called them cold diffusers or blowers in the locker room.

Q12. Where was the chill room with relation to the locker room? [1112]

A. The chill room was adjacent, and I understand from when I was out there last, as I remember, it is still adjacent to the locker room, right next to it.

Q13. In what room was the Carrier diffuser?

A. Both Carrier diffusers were in the chill room, the high temperature room.

Q14. Then you referred to the ceiling unit also as a Carrier diffuser? A. That is right.

Q15. I hand you a paper on the back of which is entitled "Western Engineering Company," and clear at the bottom "Portland, Oregon," and will ask you to compare the machine represented on page 2, having the blue background, with the Carrier diffuser unit—not the ceiling mounted but the other unit—which you say was installed in the pre-cooling or chill room?

Mr. Lyon: That is objected to on the ground that the witness has not been qualified to answer the question.

Mr. White: Q16. Did you not testify, Mr. Postlewaite, that you have had familiarity in the past with Carrier equipment?

Mr. Lyon: That is objected to.

Mr. White: I am wrong. I am sorry. I will endeavor to correct myself.

(Deposition of Mark A. Postlewaite)

Q17. Mr. Postlewaite, have you in the past had occasion [1113] to become familiar with Carrier refrigeration equipment?

Mr. Lyon: That is objected to as immaterial.

A. You mean previous to now?

Q18. Yes.

A. Well, I think that I know Carrier equipment better than anybody else in the Northwest. I think I am familiar with this. I think I could take it apart and that I could make the thing.

Q19. For how long have you been familiar with Carrier equipment?

A. How long have I? Well, 1937—or 1936, in fact.

Q20. Do you recognize the machine shown on the paper which you now hold?

A. It is very similar to the one out there, with one difference. It has two fans instead of three. It is a smaller unit.

Q21. You mean the unit at Yamhill has two fans?

A. Two fans instead of three shown in the picture.

Q22. How does the top structure in the picture compare with the corresponding part of the Yamhill installation?

A. It is the same. There are two outlets.

Q23. There are two outlets, and the picture here shows how many? A. Three.

Q24. Does the Yamhill diffuser contain a part corresponding [1114] to the section indicated in the picture as "Seamless copper coil with aluminum fins for Freon"?

A. Yes.

Mr. White: We would like to have this marked as Plaintiff's Exhibit Y-25.

(Deposition of Mark A. Postlewaite)

Mr. Lyon: Objected to on the ground it is neither properly proven nor identified, and an improper method of proof; incompetent, irrelevant and immaterial.

(The printed folder above referred to was thereupon marked by the Notary Plaintiff's Exhibit Y-25, for identification.)

Mr. White: Q25. Incidentally, do you happen to know whether the diffuser unit as installed at the Yamhill plant is still in the plant?

A. Yes, the last time I was out there.

Q26. That was how recently?

A. Oh, a year ago last July.

Q27. Will you describe the parts of the refrigerating equipment installation made in this Yamhill plant which were used for the purpose of cooling this locker room? I am speaking now, Mr. Postlewaite, as of the time when the installation was first made.

Mr. Lyon: That is objected to on the ground the witness has not been qualified to answer the question.

Mr. White: Strike the question. [1115]

Q28. Were you present at the time when the installation was made?

Mr. Lyon: That is objected to as leading and suggestive.

Mr. White: You may answer.

A. Yes, I was there. I superintended the opening of the boxes and the placing of the equipment, and I instructed Mr. Broms with sketches and with my hands as to where I wanted the pipes to run and the controls to go. Is that the answer you mean?

(Deposition of Mark A. Postlewaite)

Q29. Yes. Now will you describe how the installation was made pursuant to your supervision.

A. The cold diffuser or blower was located in the chill room next to a partition wall between the chill room and locker room. Holes were cut in this partition near the floor for the return air to come into the cold diffuser, and near the ceiling holes were cut for the supply air from the cold diffuser into the locker room. In the basement or half basement, dirt floor, the ice machine or the compressor unit was mounted on a wood platform, and the liquid line was run from the condensing unit to the expansion valve on the cold diffuser. The suction line was run from the cold diffuser to the compressor suction, and a hot gas discharge was run from the compressor discharge to the cold diffuser coil inlet, and valves placed so that hot gas could be used to manually defrost the coil of ice. Now that completes the thing, as far [1116] as I know.

Q30. To what coil, referring to Plaintiff's Exhibit Y-25, do you refer?

A. The seamless copper coil with aluminum fins for Freon. Does that answer it?

Q31. Yes. Did the diffuser unit in the chill room have some means for collecting ice or water from the coil?

Mr. Lyon: That is objected to as leading.

A. Well, there is a picture which shows a pan underneath the coil.

Q32. I am referring to the unit at Yamhill.

A. Yes, there is a pan on the coil diffuser similar to the one in the Illustration.

Q33. And at Yamhill what happened to any water or any liquid entering this drip pan?

(Deposition of Mark A. Postlewaite)

Mr. Lyon: That is objected to as leading.

A. Well, in the middle of the pan is a pipe connection draining the pan which slopes to this pipe connection, and a hole was put in the floor and a piece of pipe and a hose run through the floor. Does that answer the question? I want to answer your question. It spilled onto the dirt floor of the basement.

Q34. Where was the hose?

A. The hose was used passing through the floor, the insulated floor. [1117]

Q35. Passing through the insulated floor?

A. That is right.

Q36. Was that the pipe to which you refer?

A. The pipe was a short piece of pipe to which the hose was attached.

Q37. Mr. Postlewaite, at the time this installation was first put in was any means employed for defrosting the coil on this Carrier unit?

Mr. Lyon: That is objected to as already asked and answered.

A. Hot gas from the condensing unit was piped to the unit and used to defrost the coil.

Mr. White: Q38. Did that expedient continue to be used?

A. A very short time. It was deemed too slow, and the store manager complained that he was incapable of operating it that way.

Q39. What if anything was done to correct or change that condition?

A. After discussing it with our service man, he suggested that water be used to defrost the coil, and after

(Deposition of Mark A. Postlewaite)

considerable argument about it, why, permission was granted him to get the material together to install it.

Q40. Who granted him that permission?

A. I did. He got all ready to install it and stated that he was not as fast or as accomplished a pipefitter as he was [1118] a copper tubing installation man, so he requested help, which I gave him myself. I went out to Yamhill with Broms, the installation man, and the two of us cut the pipe and fittings and installed water connections to enable the store manager to defrost the coil of ice.

Q41. Will you describe what you and Broms installed.

A. In the cold diffuser or blower unit between the cooling coil and the fans we installed a galvanized pipe in which holes were drilled to allow the water to spray at a number of points along the pipe. The pipe extended through the housing at the end of the cold diffuser, and a hose was connected to the water main with the valve in the basement. At a point between the hose connection and the housing outside of the cold diffuser a handle was placed so that the water distributing pipe could be rotated around its horizontal axis, sprinkling the coils from side to side at the choice of the operator.

Q42. You referred to a valve. Where was the valve located?

A. The supply valve was located in the basement where the water mains were.

Q43. When you say "water mains," to what do you refer?

A. That is the supply water to the building.

(Deposition of Mark A. Postlewaite)

Q44. Explain how the water flowed from the supply main to the perforated pipe to which you have referred? [1119]

A. When the operator opened the valve on the supply side of this water connection to the cold diffuser, water passed through the valve up through—through the pipe into the hose, and then into the perforated header, the perforated distributing pipe.

Q45. Did you operate the defrosting equipment which you have described? A. Yes.

Q46. Will you describe, please, how you operated that equipment.

A. You mean how I defrosted or how I operated the header?

Q47. How you operated that equipment in a defrosting operation.

A. Let's see. First, I closed the hand stop valve supplying liquid refrigerant, Freon, to the cool coil. Then we opened the water supply valve supplying water to the distribution pipe.

Q48. That is the pipe in the diffuser?

A. That is right—did that in the basement. Then we went upstairs into the cold storage room and moved the handle rotating the pipe and changing the sprays from front to back a number of times until we felt sure the ice was all off the cool coil. Then we went back into the basement and turned the water off and opened a valve allowing the residual water in the line to drain out of the supply pipe to [1120] the distributing pipe. Then I opened the supply valve on the liquid refrigerant line to the cold diffuser and started the operation again.

(Deposition of Mark A. Postlewaite)

Q49. You referred to that diffuser as containing a fan or blower. Does or did the operation of the blower have any connection with a defrosting operation?

Mr. Lyon: That is objected to as leading.

A. Any defrosting operation with this type of equipment necessitates the shutting down of the fans during the entire defrosting operation.

Mr. White: Q50. Was that true in your operation of the equipment at Yamhill?

A. Yes, that is true.

Mr. Lyon: Objected to as leading.

Mr. White: Q51. Mr. Postlewaite, why did you drain the water out of the hose line running to the spray pipe, as you have described?

Mr. Lyon: That is objected to as already asked and answered, and also as a conclusion of the witness as to why; a mental attitude.

Mr. White: Q52. Did you do that for any specific purpose?

Mr. Lyon: Same objection.

A. Well, we have used brine in some jobs for defrosting, and where the brine has been allowed to get dilute the defrosting and the whole operation is imperiled due to the frozen [1121] pipes, and just as a precaution, to keep from having the pipes frozen and stopping all operations, we put that valve in.

Q53. Why did you take that precaution in this instance?

A. Well, just insurance.

Q54. Was the unit visible in the chill room when first installed as you have described?

A. When it was first installed, yes.

(Deposition of Mark A. Postlewaite)

Q55. Do you have any recollection of temperature conditions in that chill room at that time?

A. Well, the temperature conditions at first were above freezing, just what was desired. At that time the lockers were not all sold, and later as the lockers became sold and the load became more on the cold diffuser equipment the apparent lack of capacity was complained of and the cold diffuser was housed in and insulated.

Q56. Do you recall having made any observations that would indicate temperature conditions in the chill room at the time this diffuser unit was openly exposed in that room?

A. I know that I set the thermostat at 35 degrees in this chill room.

Q57. Do you know whether the chill room temperature was that high?

A. Yes, I know that at times it was that high.

Q58. And at this same time was that Carrier ceiling diffuser [1122] that you previously referred to in operation? A. Yes.

Q59. Was the installation changed thereafter, to your recollection, while still using water for coil defrosting as you have described?

Mr. Lyon: That is objected to as leading.

Q60. You have previously testified that the diffuser unit was housed in and insulated. Will you explain how that housing and insulation was made.

A. While the cold diffuser was not moved, a wall or insulated partition was built from the common partition wall between the two rooms around the cold diffuser from the floor to the ceiling, making a third room in which

(Deposition of Mark A. Postlewaite)

this cold diffuser was the only thing located in there. There was no other equipment in there.

Q61. Was the interior of that third unit-containing room accessible?

A. Yes. We could not get in there, but we could open doors and reach in.

Q62. Did you observe the operation of this system after the unit was housed in as you have described?

A. Yes.

Q63. Did you make observations of temperature conditions in the locker room?

A. Yes, the locker room controlled temperature—the [1123] thermostat was set to operate between 5 and 10 degrees Fahrenheit and did that. I observed that it did that.

Q64. Do you know that, when that temperature existed in the locker room, the temperature was in this third insulated unit-containing room?

A. I don't know just what the temperature was, but I do know that water in there froze during operating periods. It must have been considerably below freezing.

Q65. Where did water freeze in there?

A. On the sides of the unit, and on the floor where the sprays would splash out, the spray water would splash out through the connections.

Q66. Did you operate this water defrosting system in the manner previously described after the unit was enclosed within this insulated wall?

A. Yes, I operated it.

Q67. Did you observe the results of its operation?

A. Yes, I know pretty well what I saw there.

(Deposition of Mark A. Postlewaite)

Q68. What did you see?

A. I saw that as long as the water supply was maintained in the main coming into the building the defrosting was as "Tony" Broms, or Anton Broms, had first anticipated, and that when the water supply was not maintained the defrosting did not occur or the de-icing did not take place, and I had another problem. [1124]

Q69. Was the water pressure adequate at times?

A. It was adequate at times, but sometimes people would use the water on other places in the building and then the pressure would drop and the defrosting or de-icing would not take place, and as a result you could not be sure that ice was off.

Q70. Would any de-icing take place when the water pressure was down?

A. If the pressure were reduced enough, other uses were large enough, the de-icing would drop to— did not occur at all. At other times when the pressure was just partially reduced, why, the de-icing was slow, very slow.

Q71. But there was de-icing?

A. As long as there was water there was de-icing.

Q72. When higher water pressures existed what was the result of the de-icing operation?

Mr. Lyon: That is objected to as calling for a conclusion of the witness and too indefinite to be of any value.

Mr. White: I will reframe the question.

Q73. Is it true that at times the water pressure was higher than on those occasions to which you last referred?

(Deposition of Mark A. Postlewaite)

Mr. Lyon: That is objected to as leading, and also as too indefinite to be of any value.

A. At times there was sufficient water pressure on the mains to force sufficient water into the spray pipe to defrost [1125] or de-ice the coils in what I considered a satisfactory time.

Q74. Did you observe the result of the de-icing operation at those times?

A. There were times when there was sufficient water pressure that the ice was entirely removed from the coils, sufficiently so to produce a satisfactory cooling operation later.

Q75. Mr. Postlewaite, did water freeze at any time within your observation in either the perforated spray pipe or the hose connection with the valve in the basement?

A. At one time while checking the time of defrosting the coil I found that the water pressure had been reduced sufficiently that the defrosting did not take place, and at that time I started to put the coil back into operation, trying to prevent the temperature in the locker room from getting too high. At that time the drain valve on the supply line to the cold diffuser was closed, and after the water pressure came back up we tried to open the valve in the supply line, which we did, and the water did not flow, so we had to get a torch and thaw it out.

Q76. Did you encounter any similar situation at other times and at higher water pressures?

A. Never—no, I can't answer that "Yes" or "No." When the drain valve was opened the water drained out and there was no freezing in the line. When the valve

(Deposition of Mark A. Postlewaite)

was closed, [1126] and there was sufficient water, the operation took place and there would be no freezing in the pipe.

Q77. And that is true within your personal direct observation of the operation of the system?

A. I went out there a number of times due to the complaint of the operator trying to check on him to see if he was defrosting correctly. I think I know more about that because I understand it pretty thoroughly.

Q78. Did you see the system in operation after its installation which you have described?

Mr. Lyon: That is objected to as already asked and answered a number of times.

Mr. White: I am speaking, Mr. Postlewaite, after the plant was turned over to the customer.

Mr. Lyon: Same objection.

A. The plant had been turned over to the customer and it was all paid for when the water defrosting was installed.

Mr. White: Q79. Do you mean the plant was paid for at the time the water defrosting was installed, or before or after?

Mr. Lyon: That is objected to as leading.

Mr. White: Q80. Will you give me, within your own personal knowledge, the time when the plant was paid for with reference to the time when the water defrost system was installed. [1127]

A. Well, I can't tell you just what date Mr. Trullinger paid it, because the money came in, and we kept no bank accounts or any record of things like that. All moneys or any payments on any contracts went to our head office

(Deposition of Mark A. Postlewaite)

in Seattle. I do know that Mr. Trullinger brought up the point at the time we installed the water defrost, he said, "Well, this thing is all paid for. I suppose you fellows are going to leave me high and dry." And we made quite a point of the fact—played it up to him—that we were trying to still accept the responsibility of the operation of the plant in a satisfactory manner, at least for the year that the equipment was guaranteed for.

Q81. Did you subsequently see to the operation of the plant? A. That is right.

Mr. Lyon: That is objected to as already asked and answered several times.

Mr. White: Q82. Would that be in the nature of service work?

Mr. Lyon: That is objected to as immaterial.

A. Well, the water—

Mr. White: Q83. Mr. Postlewaite, will you just answer the question that I asked. I will try to clarify that. Did you do any work causing or involving your inspection or familiarity with that unit after it was installed and turned over to the company, to Trullinger & Eustice? [1128]

Mr. Lyon: That is objected to as already asked and answered a dozen times. He said it was turned over to them and when it was paid for, and it was paid for before this so-called water defrosting was installed.

Mr. White: That is your conclusion, counsel.

Mr. Lyon: That is just what he stated.

Mr. White: The witness stated he didn't know exactly when it was paid for.

Mr. Lyon: He said Mr. Trullinger had told him it was paid for before he made the change-over.

(Deposition of Mark A. Postlewaite)

Mr. White: Let's clear up that question right now.

Q84. Mr. Postlewaite, can you tell us of your own knowledge when that plant was finally paid for, the date of it?

Mr. Lyon: That is objected to.

A. I couldn't tell you.

Mr. Lyon: That is objected to as already asked and answered and an attempt to cross-examine your own witness.

Mr. White: Q85. Do you know the exact date?

A. No.

Mr. White: That is exactly the point I wanted to bring out.

Q86. Now after it was paid for, Mr. Postlewaite, were you at Yamhill to see the unit? A. Yes.

Mr. Lyon: Just a moment. How can he possibly answer the [1129] question when he says he doesn't know when it was paid for.

Mr. White: Not a bad observation, counsel.

Q87. After the plant was installed, Mr. Postlewaite, as you have described, did you go to Yamhill to see it?

Mr. Lyon: That has been answered a dozen times.

Mr. White: I will accept that continuing objection, counsel. Let's get on with the deposition.

Mr. Lyon: After all, you should confine yourself to questions and not to cross-examining your own witness. The question has been asked and answered many times, and I object to the continued attempt to cross-examine this witness.

(Deposition of Mark A. Postlewaite)

Mr. White: I am merely clarifying that one point.

A. At what I considered the completion of the job I notified our headquarters in Seattle that the job was complete and advised them that if they had any payments due at the completion of the job they were then due. From then on I have no way of knowing whether any money was paid or not. But I did go to the job after that, not once but many times, with the idea of having responsibility of the operation of the plant for a year, twelve months.

Q88. Did you visit the plant within that twelve-months period? A. Yes, sir.

Mr. Lyon: That is objected to as already asked and answered. [1130]

Mr. White: Q89. At approximately what intervals, as closely as you can remember?

A. Oh, they were not any shorter intervals than two weeks, and some of them might have been up to a month; from two weeks to a month apart.

Q90. That would be your best approximation?

A. That is right.

Q91. And did or did not those visits continue throughout that year period?

Mr. Lyon: That is objected to as already asked and answered.

Mr. White: I said before, counsel, within that year, and I am now talking about throughout that year.

A. Yes, they continued throughout the year, the period of a year.

Q92. Was that water defrost system as you have described it still installed and in operation in the plant

(Deposition of Mark A. Postlewaite)

throughout that year so far as you could tell from your visits?

Mr. Lyon: That is objected to as leading.

A. The water defrost was still installed and in operation at the end of the year.

Mr. White: Q93. Mr. Postlewaite, at the time of those visits did you visit the locker room?

A. Yes.

Q94. Did you observe the temperature conditions therein? [1131]

A. Yes. That was very important.

Q95. What did you find to be the temperature conditions in the locker room?

A. I found the temperature to be between five degrees above Fahrenheit and ten degrees above Fahrenheit on every occasion except one.

Q96. What was the approximate temperature, if you recall, on that occasion?

A. It was up to twelve degrees.

Q97. What was stored in the locker room during that time?

Mr. Lyon: If you know.

Mr. White: Q98. Or do you know what the locker room contained?

A. Well, the lockers were full of farmers' produce, so I was told.

Mr. Lyon: I move to strike the statement as hearsay.

A. I could see packages in the lockers; that is all. I could see that the lockers were occupied. That is all that I know.

(Deposition of Mark A. Postlewaite)

Mr. White: Q99. Did that water defrost system continue to be used at all times after this year period to which you have referred, if you know?

Mr. Lyon: That is objected to as calling for a conclusion of the witness.

A. Do you mean is it still in operation? [1132]

Mr. White: Q100. Yes, I will accept that.

A. I have been there since that time and the water defrost is not in operation.

Q101. What means is now used to defrost the coil?

A. Warm air defrosting. Warm air is used to defrost the coil.

Q102. Do you know who installed the warm air defrost system? A. Yes.

Q103. Who?

A. Western Engineering. We installed it.

Q104. Do you know a Mr. Hastorff or the Hastorff Company? A. Yes.

Q105. Will you identify either the individual or the company.

A. Well, the Hastorff Company had the franchise for Carrier equipment in Portland and surrounding vicinity from the time that Electrical Products did not have it, or it was taken from them—I don't know why they separated, but from that period up until the time Western Engineering took the Carrier franchise in December, 1938.

Q106. Do you recall approximately when that warm air defrosting system was installed?

A. It was installed in the winter of '38-'39.

(Deposition of Mark A. Postlewaite)

Q107. Do you know Mr. M. O. Cox here in Portland, who [1133] resides or has a place of business at 1611 Southeast Ninth Street? A. Yes, I know him.

Q108. Do you know whether he had anything to do with work incident to the installation of this warm air defrosting system?

A. It is my recollection that he did.

Q109. What did he do?

A. The sheet metal work and the dampers that were necessary to carry the air from the cold diffuser outlets up through the roof were furnished and installed by him.

Q110. You know that of your own personal knowledge?

Mr. Lyon: That is objected to as leading.

Mr. White: Q111. Do you know that to be a fact?

Mr. Lyon: Same objection.

Mr. White: Q112. Do you know that Mr. Cox did that work?

A. At the time the work was done Western Engineering was renting part of the building from M. O. Cox, and we gave M. O. Cox all the sheet metal work that came our way—the same address.

Q113. Insofar as you know, Mr. Postlewaite, does Western Engineering have any record of the date of that change-over? A. Which change-over?

Q114. The date of installation of the warm air defrosting [1134] system?

A. They may have, but I haven't had time to look for it. Jarvis knows how busy we are now, and we have moved twice since that time, and it would take some probably three or four days to check our records. We haven't had time to look for it.

(Deposition of Mark A. Postlewaite)

Q115. Mr. Postlewaite, do you know a Mr. Gail Shapley? A. Yes.

Q116. Is it a fact that he is now an employee of yours?

A. Yes. He is our employee.

Q117. Do you know whether he was present at the Yamhill plant while the water defrost system was installed and in operation? A. Yes, he was at that plant.

Q118. How do you know?

A. Because after the plant was installed I had difficulties with Anton Broms due to Anton Broms declining to join the union, and the company policy of Electrical Products was that everybody in the organization working at a journeyman's trade had to belong to the union, a suitable craft, and as a result of that Mr. Shapley was put on to work shortly after the first of the year in 1937. And any service call or any work that was done from 1937 on to this date he either did himself or he superintended for me or Hastorff or Western Engineering.

Q119. Did his service work include service work at the [1135] Yamhill plant? A. It did.

Q120. Did you personally see him there?

A. I did.

Mr. Lyon: That is objected to as leading. It might be well to let the witness testify just a little bit, Mr. White.

Mr. White: The witness said yes, I believe, to the last question.

Mr. Lyon: And I believe he had finished.

Mr. White: The witness has testified that he was at the Yamhill plant, and I asked him merely if he saw Mr. Shapley there after he had stated that Mr. Shapley did service work for him out there.

(Deposition of Mark A. Postlewaite)

The Witness: I took him out there the first time and showed him the installation and explained it to him.

Mr. Lyon: Just a moment. There is no question before you. I move to strike the statement of the witness as entirely voluntary.

Mr. White: Will you check the record, Mr. Reporter, to see if we have a question?

(The record was read as requested.)

Mr. White: I believe that is all.

Cross Examination

By Mr. Lyon: Q121. You stated, Mr. Postlewaite, that you carried out these operations of turning on the water to try [1136] to remove the ice from the coils on this Carrier diffuser. How long did you let the water run?

A. Oh, I timed it as long as fifteen minutes.

Q122. As long as fifteen minutes. Never any longer?

A. When the water pressure dropped, yes, I had to wait longer. I have waited sometimes as long as forty minutes.

Q123. And sometimes longer than that, didn't you?

A. Well, I may have and may not. I didn't note the time.

Q124. During that period of time the temperature inside of the diffuser raised to practically the temperature of the water, didn't it?

A. Well, no, I don't think so. It might have. I couldn't tell you that for sure.

Q125. You never measured it?

A. No, I never measured with a thermometer, no.

(Deposition of Mark A. Postlewaite)

Q126. But you know it raised considerably above freezing?

A. It went above freezing when—well, you see, the cold diffuser was inside of the room once and was outside of the room once.

Q127. Well, it was outside of the room at all times that this water was used?

A. Outside of the locker room, yes. If this were the chill room, it is in the chill room here and all exposed; you can walk up there and put your hand on it. When you defrosted that way the sweat just rolled right off of it and it came [1137] right up to above freezing temperature.

Q128. I mean when it was closed with this wall you put doors—

A. So you could reach in.

Q. (Continuing)—in front of the inlet and outlets so that you could close off circulation from the locker room to the diffuser, didn't you?

A. Yes, sir.

Q129. And kept the cold air from the locker room going into the diffuser during the time of your spraying water onto the coils?

A. The door was put on there so that when you were not defrosting the air would not get in there from the locker room, into the space around the cold diffuser.

Q130. Well, you had doors, inlet and outlet, that closed the wall opening into the diffuser from the locker room, too, didn't you? Or maybe you don't remember that.

A. Wait a minute.

There were doors into this insulated room compartment in which the cold diffuser was located, and those doors were always closed except when you were defrosting.

(Deposition of Mark A. Postlewaite)

Mr. Lyon: Q131. And also the diffuser outlet was connected through an opening in the wall in that cold room, wasn't it? A. That is right.

Q132. There was a door to close that outlet placed there, [1138] wasn't there, or a door to close that outlet and the inlet? There was both an inlet and outlet in that wall, wasn't there?

A. Yes, but we didn't close that—I didn't close that door myself.

Q133. You never closed any of those doors?

A. No, sir.

Q134. You don't know whether there were doors there or not?

A. Right now I couldn't tell you, in other words, that there were, because I was not interested in the thing from an experimental point of view. I was interested in seeing if I could get the plant to operate without—

Q135. What you were doing—

Mr. White: Let the witness finish.

A. —trying to get the water to defrost. I was trying to get the water defrosting on its own legs.

Mr. Lyon: Q136. You were experimenting, weren't you?

Mr. White: That is calling for a conclusion of the witness.

Mr. Lyon: The witness has already used the word.

A. I was trying to prove the operation of water defrosting.

(Deposition of Mark A. Postlewaite)

Mr. Lyon: Q137. As you stated, you were experimenting with it? That is why you went out there so often?

A. I didn't go out there with the idea of experimenting. [1139] You haven't asked me why I went out, so all I can say is I didn't go out with the idea of experimenting.

Q138. You did state you went out to try to prove whether it would work or not, didn't you?

A. Well, I had already proved—

Q139. Just answer that question, please.

A. Well, I can't answer it "Yes" or "No." I don't think I can, because I went out to see why somebody said it didn't always work.

Q140. You had those complaints that it didn't always work?

A. I had complaints that it didn't always work.

Q141. And those complaints came from the operator?

A. That is right.

Q142. And that operator was Mr. Eustice?

A. Yes, sir.

Q143. And any other operator?

A. He had a meat cutter there at times. That fellow is dead now.

Q144. Who also complained that it didn't work at times? A. He couldn't work it at times.

Q145. He couldn't make it work?

A. That is right.

Q146. Now when is the first time that you saw that this device had been removed and completely replaced?

A. Oh, in the spring of '38. [1140]

(Deposition of Mark A. Postlewaite)

Q147. Now after the spring of '38—

A. The spring of '39 or winter of '38-'39 we changed the water defrost.

Q148. Now after this had been replaced did you continue to go out there at periods of two weeks to a month to find out whether the new system was operating or not?

A. No.

Q149. You didn't repeat this proposition of going out there every two weeks or a month after that?

A. No.

Q150. You are acquainted with Mr. H. T. Jarvis sitting here, are you not?

A. I have seen him at times.

Q151. You have met him quite a number of times?

A. Right.

Q152. The Western Engineering Company was formed, you say, in the forepart of 1938?

A. No, in December, 1938.

Q153. Isn't it a fact that Mr. Trullinger helped finance the formation of that company? A. No, sir.

Q154. He had no money in it at all?

A. He had no money in it at all.

Q155. At any time? A. At any time. [1141]

Q156. Had nothing to do with the formation of that company? A. Absolutely not.

Q157. As a matter of fact, Mr. Postlewaite, you do not of your own personal knowledge know that that job was ever paid for, do you?

A. No, sir. I never handled the money.

(Deposition of Mark A. Postlewaite)

Q158. At the time that you stated you located this equipment at this Yamhill plant what was your reason for locating the diffuser outside of the cold room or outside of the locker room?

A. Why we located it outside of the locker room? The row of lockers that would fit would be misaligned if the cold diffuser were put in the locker room, and at the request of Mr. Trullinger, that he would rather have that for the lockers why, we looked for a space to put it. For a while we thought we would put it outside the room, the cold storage room, entirely; but we finally decided to sacrifice part of the chill room and put the cold diffuser in there as being more centrally located with respect to the locker room.

Q159. Now, you have been out there and inspected that system, you say, a year ago last July, haven't you?

A. Yes, sir.

Q160. There is no misalignment of lockers by the positioning of that unit now, is there? •

A. That is a matter of opinion. [1142]

Q161. The lockers run in straight lines, don't they?

A. That is right.

Q162. And continuously? A. Yes.

Mr. White: That assumes a fact not in evidence.

Mr. Lyon: I am asking the witness a question. He said yes. Kindly don't interrupt.

Q163. Did you see any misalignment of these continuous runs of lockers by the positioning of that Carrier diffuser when you last saw the installation?

A. You want a "Yes" or "No" answer on that?

Q164. Yes. A. Or do you want to know why?

(Deposition of Mark A. Postlewaite)

Q165. No, I want a "Yes" or "No" answer.

A. I will give you a "Yes" or "No" answer, but that is not the answer.

Mr. White: You may answer "Yes" or "No" and explain your answer.

A. Well, I will say I don't notice any misalignment now. The lockers run quite low along the wall, different than they were planned at the time that the cold diffuser was first installed.

Mr. Lyon: Q166. Do you know whether the lockers have been changed in any way from the time they were installed? Weren't they originally installed the same way they are now? [1143]

A. The lockers were not exactly the same—the rows were not just exactly the same as they were when I was out there last.

Q167. That is a year ago last July?

A. Yes, sir.

Q168. You haven't been there since then?

A. No, sir.

Q169. As a matter of fact, you noticed when you were there a year ago last July that there were a lot more lockers than there were when the installation was first made, didn't you?

A. Yes, sir.

Q170. In fact, there were about 250 lockers in there originally and there are about 350 now; isn't that true?

A. There were 178 when we first started the plant.

Q171. There is about 350 now in the room?

A. I don't know how many there are. I had no reason to count them.

Q172. But you know there is a lot more than 178?

A. Absolutely.

(Deposition of Mark A. Postlewaite)

Q173. Isn't it a fact that you have placed the cold diffuser outside the locker room in order to take advantage of the higher temperature out there for the carrying out of defrosting operations? A. No, sir. [1144]

Q174. That had nothing to do with it?

A. Absolutely not.

Q175. There is a higher temperature outside the locker room which would aid you in defrosting the unit, isn't there? A. Yes.

Q176. How long had you been in the refrigeration business during the time of 1936-37?

A. How long had I been in the refrigerating business? I have been in the equipment business since 1925. I had been handling ice machines since 1915.

Q177. All right. Now, in handling ice machines you know that there had long been a problem in the matter of defrosting, and many different means had been tried and many different failures made, didn't you? There was a lot of trouble with defrosting?

A. I knew that defrosting was a problem, a very serious problem.

Q178. Didn't you know at the time of this Yamhill installation that you could not defrost a unit with hot gas unless you had a stand-by supply of hot gas?

Mr. White: This is objected to as entirely irrelevant and immaterial; whether there was a stand-by supply of hot gas for a hot gas defrosting system which the witness said was taken out is utterly of no consequence.

Mr. Lyon: Answer the question, please. [1145]

A. I estimated the job to be defrosted with hot gas exactly as instructed in the Carrier price and data information and installed it that way.

(Deposition of Mark A. Postlewaite)

Q179. And you did not know at that time that if you did not have a stand-by charge of hot gas that hot gas defrosting would not work?

A. Well, I am not familiar with your term there, but we have made other installations which I am sure are still in operation exactly a duplicate of this except that it still has hot gas defrosting.

Q180. Only one compressor operating one diffuser?

A. Absolutely.

Q181. And you turned off the compressor when you wanted to defrost? A. Yes, sir.

Q182. And you do that now?

A. You don't turn your compressor off. You operate the compressor, but you run the hot—you are treading pretty close to a trade secret—not a trade secret, but a trade knowledge now. In other words, to explain this thing satisfactorily to you I am going to have to tell him how we do it, which is something he doesn't know.

Q183. He is not interested.

A. I know, but I want you to understand how this thing is. In other words, the information we get from the catalogue [1146] and the price and data sheets we are told to keep confidential, and I am telling you now that if you want to bring that in I will have to bring in something else here.

Q184. Was that information in the price and data sheets in 1936? A. Yes, sir; it was.

Mr. White: Just a moment, counsel. I want to enter on the record an objection to this line of examination as being entirely incompetent, irrelevant and immaterial, and unless you will point out wherein it is relevant to anything

(Deposition of Mark A. Postlewaite)

in the witness' direct examination I shall instruct him not to answer.

Mr. Lyon: You go right ahead and instruct him not to answer if you think you should. The witness has testified to the proposition of first using hot gas, as the first way this system was installed. I am certainly entitled to cross-examine him fully with respect to that installation, and it is cross examination.

Mr. White: If you will confine your examination to that installation—

Mr. Lyon: I haven't asked him about any other installation. He has volunteered statements with respect to other installations. I haven't asked him.

The Witness: That is right. All right. The Carrier has a method— [1147]

Mr. Lyon: Just a moment. I don't believe there is any question in front of you at the present time.

Mr. White: May I—

Mr. Lyon: You may take him on redirect examination when it is your turn.

Mr. White: All right.

Mr. Lyon: Q185. You state that this so-called trade secret method was in the Carrier price and data sheets at the time you made this installation? A. Yes, sir.

Q186. Did you utilize that so-called trade secret at that time? A. Yes.

Q187. And it didn't work?

A. Well, it didn't work where?

Q188. At the Yamhill installation.

A. It worked at the Yamhill installation, but it required a very careful balance, heat balance, between the feed of hot gas to the coil and the condensed liquid re-

(Deposition of Mark A. Postlewaite)

turn to the compressor section, which type of operation was manual; and Mr. Eustice, the operator, was too impatient to adjust it to conditions.

Q189. He just couldn't make it work; that is what you mean?

A. My opinion at the time was he wouldn't make it work. [1148]

Q190. Well, he didn't make it work?

A. He didn't give a damn. During a fight with Mr. Eustice his brother-in-law—you see, Trullinger and Eustice are brother-in-laws, and they had a hell of a fight.

Mr. White: Mr. Postlewaite, I would suggest you confine your answers to the questions.

Mr. Lyon: He is explaining his answer. Let him go ahead and don't interrupt the witness' answer.

The Witness: It is my opinion that he just wouldn't operate it, wouldn't make an attempt to operate it. Put it that way.

Mr. White: We are still speaking of the attempted hot gas defrosting; is that true?

A. That is what I think you were talking about.

Mr. Lyon: That is right.

Q191. Now, Mr. Postlewaite, do you know how long it takes to defrost that system using the present hot air system, or have you ever observed the operation or tried it?

Mr. White: To what system do you refer?

Mr. Lyon: The Yamhill installation.

Mr. White: The question is objected to; no proper foundation.

(Deposition of Mark A. Postlewaite)

A. Q. Well, it varies, depending on the amount of ice that has been accumulated on the coil.

Mr. Lyon: Q192. Have you ever seen it defrosted with [1149] this hot air system down there at that particular plant? A. Yes, sir.

Q193. How long did it take at the time that you saw it?

A. Well, from the time that it was started to defrost to the time that we started back to operating it was about thirty minutes.

Q194. About thirty minutes?

A. But we were not standing there watching the minute the ice was all off. We didn't start it right up again. We went ahead and chewed the fat.

Q195. Let me ask you another question: What is the rate of temperature rise of that defrosting room when the diffuser operation is discontinued or the supply of refrigerant is stopped to the heat transfer coils of the diffuser? A. You are a little too fast for me.

Q196. When the refrigerating machine is stopped you stated that you made observations of the temperature rise of that room at times when you were trying to carry out the defrosting operation. What was the rate of temperature rise of the locker room when the refrigerating machine operation was discontinued?

A. When the ice machine was shut off what was the temperature rise in the locker room itself?

Q196. That is right.

Mr. White: The question is objected to. There is no [1150] foundation for it. You haven't asked him whether he observed.

Mr. Lyon: He so testified on direct examination.

(Deposition of Mark A. Postlewaite)

Mr. White: Did he testify on direct examination that he observed temperature conditions at the time the unit was turned off?

Mr. Lyon: Yes, he did. Just let the witness answer the question.

Mr. White: Will you ask him that question again, then, rather than to take time to review the record?

Mr. Lyon: I think the witness thoroughly understands the question.

Mr. White: Whether he observed the temperature conditions in the locker room at and following shutting off of the diffuser?

Mr. Lyon: I think the witness understands the question and does not need any coaching. I will just ask that the question be read and ask the witness if he can answer the question.

A. The temperature rose—I remember it rose as much as two degrees.

Q198. In how long a period of time?

A. Less than an hour.

Q199. Two degrees in an hour. And that was your observation of the rate at which the temperature rose in the locker room per hour during the times that you were making these determinations of its operation? [1151]

Mr. White: That question is objected to. The witness didn't say anything of the sort. He didn't say two degrees per hour. He says it rose two degrees in an hour.

Mr. Lyon: Q200. Can you answer the question, Mr. Postlewaite?

A. I remember the room temperature rising two degrees in less than an hour during a defrosting period.

(Deposition of Mark A. Postlewaite)

Q201. In how much less than an hour? You are pretty well acquainted with the room out there, are you not? A. Well, I remember it.

Q202. You spent quite a lot of time in there?

A. Yes, some years ago; yes.

Q203. If the refrigeration machine was removed entirely and placed out of operation for a period of twenty-four hours, can you tell me how much the temperature would rise in that locker room, approximately?

A. No. Nobody else that I know of can tell you that.

Q204. It would be a material rise, somewhere in the neighborhood of the same rate that you stated, two degrees per hour? A. Not necessarily.

Mr. White: Just a moment, counsel. I object to those questions. The witness has contradicted you before you ask the question.

Mr. Lyon: Just let the witness finish his statement. [1152]

A. The temperature rise in a condition like that is not a straight line but a curve. It is very sharp at the lower temperatures, and as the refrigerated room assumes closer the temperature of the outside atmosphere, wherever, the temperature is leaking through the walls, why, the rate slips off so it would be a much faster rise right at that time then.

Q205. Assuming, Mr. Postlewaite, from your experience that the room started at five degrees Fahrenheit above zero, and the room was shut off—I mean there was no refrigeration at all for 48 hours—isn't it your statement that the room would be above freezing at the end of that time?

(Deposition of Mark A. Postlewaite)

Mr. White: Just a moment, Counsel. The witness has not stated anything of the sort, and I object to this most strenuously. What he told you was that he didn't know.

Mr. Lyon: Just quiet down.

Mr. White: Just a minute. Let me finish my objection.

Mr. Lyon: All right. Finish your statement but don't make statements like that to me.

Mr. White: Just a minute, until I finish.

Mr. Lyon: You address your statements to the record. I am conducting this cross examination.

Mr. White: Am I permitted to enter my objection?

Mr. Lyon: Yes, enter your objection and enter it in a proper way, and don't try to instruct the witness in doing it.

Mr. White: I am not attempting to instruct the witness. [1153]

Mr. Lyon: All right; state your objection.

Mr. White: Will you permit me to?

Mr. Lyon: Yes, go ahead.

Mr. White: Well, please do so.

Mr. Lyon: Don't argue with me. Just state your objection.

Mr. White: My objection would long ago have been stated had you not interrupted. Now will you please let me proceed. My objection to your question was that it presupposes something that the witness had not testified to and it was directly contrary to what the witness had testified to. Further, that it appears to be an attempt to gain an admission from the witness of something which he has denied.

(Deposition of Mark A. Postlewaite)

Mr. Lyon: Let the witness take care of himself. I believe the witness can take care of himself. He has shown a very good ability to do that.

Mr. White: That may be your opinion, but at the same time the questions should be proper.

Mr. Lyon: The question is perfectly proper.

Mr. White: The objection stands.

Mr. Lyon: Will you answer the question, please.

A. I don't know. I could not guess what the temperature of the locker room, this locker room, would be 48 hours after the refrigeration is shut off. If I was going in and out of that room and other people were using it, too, so that the temperature went up, it went up and there was no stopping [1154] it. If the refrigeration were to fail I believe that any locker operator would post a sign up that nobody could go in, and lock the door. At other places I have been, in about 24 hours it has been around six degrees. Now that is just my experience, the only thing I have got to go on.

Q206. I will ask you the specific question, Mr. Postlewaite: were you present at any time when this unit was moved from outside of the locker room into the inside of the locker room?

A. Outside the locker room inside of the locker room? I was there previous to that and immediately afterwards.

Q207. You know what that operation entailed, of putting in ducts and changing the machine from one location to another, and changing the piping and changing the electrical connections, and so forth, don't you?

A. Yes, I know about what that takes; yes, sir.

Q208. And suppose that operation had taken four or five days to perform and men were going in and out of

(Deposition of Mark A. Postlewaite)

both the chill room and the locker, as is required to do such an operation, what would the temperature rise have been in that room?

Mr. White: That question is objected to as entirely irrelevant and immaterial. We are not here to examine the witness as to what supposedly might have occurred, but as to what did occur. If you want to ask the man how long the [1155] change required, I have no objection to your question.

Mr. Lyon: The man is placed here as an expert on refrigeration. You have tried to so qualify him.

The Witness: No, I didn't—

Mr Lyon: As a practical expert of seventeen to twenty years' experience in this field.

The Witness: That is my experience, but I haven't here explained that I am an expert. I am making my living that way, but I may be fooling people doing so, see.

Mr. Lyon: We will stipulate to that, but that is immaterial.

Mr. White: Just a moment. I still wish to repeat that objection.

Mr. Lyon: Your objection is stated.

Mr. White: The question was attempted to again be asked, though.

Mr. Lyon: No, I haven't asked the question again. I am going to ask that the question be read to the witness and he state whether he can or cannot answer the question.

(Last question read.)

A. I can't answer that. I don't know.

(Deposition of Mark A. Postlewaite)

Q209. You can give no approximation?

A. No, sir; I cannot. There are so many variables there.

Q210. Would the temperature rise have been any differ- [1156] ent or any less per unit of time than occurred during normal defrosting operations when you observed the temperature rise?

A. I would think that it might; it might.

Mr. White: Just a moment.

Mr. Lyon: Q211. It might be which way?

Mr. White: Just a moment, please. I wish to enter this objection again: That to my recollection the witness has at no time stated that he observed the temperature rise, the rate of temperature rise, in the locker room under such conditions as you refer to.

Mr. Lyon: Well, I think you better read the record. The witness, I think, understands.

Q212. Do you mean it would be at a greater or less rate than you have stated to be two degrees in about an hour's time?

A. I would judge that at the start of the work, when the temperature was down, that the rate would be—I can only guess at that. I couldn't give you an answer. I don't know. You are not asking me what we did to prevent a temperature rise. I can't give you an answer to that, and I don't want to take my time to guess at these things here. I have got my own business to attend to.

Q213. I know that, but you have had considerable experience in these operations, haven't you?

A. We have done considerable work, yes. [1157]

Q214. And you have made observations of change-overs in plants, haven't you? A. Yes.

(Deposition of Mark A. Postlewaite)

Q215. You have made observations of temperature changes during such change-overs, haven't you?

A. Yes, we have tried to notice those things.

Q216. And you know in this particular plant that during defrosting operations you had a temperature rise of two degrees in less than an hour's time, don't you?

A. Yes.

Q217. Now from that information are you unable to answer the question that I gave you as to what would be the temperature rise during this change-over in a period of 48 hours, assuming that there was nothing done, no other instrument put in the room or no other freezing medium put in the room, during that change-over period?

A. Well, I wouldn't tell you that.

Q218. You couldn't tell me that? A. No, sir.

Mr. White: Repeated examination along this line is objected to because the witness has unequivocally stated that he didn't know that; he knows nothing about the temperature.

Mr. Lyon: You don't need to argue the question.

Mr. White: I am not arguing.

Mr. Lyon: What are you doing?

Mr. White: I am merely objecting to the question. [1158]

Mr. Lyon: No, you are not. There is no question before the witness.

Mr. White: I am merely objecting.

Mr. Lyon: You are not objecting. There is no question before the witness.

Mr. White: I can object if I want to to this course of examination, attempting to elicit from this witness something as to which he testified he knows nothing.

(Deposition of Mark A. Postlewaite)

Mr. Lyon: He has not so testified, not by a long ways.

Mr. White: He has testified, Counsel, that he does not know the rate of temperature rise that occurred out there.

Mr. Lyon: He has testified under certain conditions, and I am asking under comparative conditions what the temperature rise would be.

Q219. Would you assume that the temperature rise would under the conditions I have stated be greatly different from the temperature rise rate during defrosting?

A. That is a hypothetical time or is this what actually took place out there?

Q220. I am asking that as a hypothetical question.

A. Well, the temperature rise is dependent on many things. First, heat loss through a wall; second, the use of doors; third, how much cold stuff is in there. If you have got one locker filled with 100 pounds of stuff the temperature will jump just like hitting a drum with a rock; it will [1159] just bounce. If you have 300 lockers in there and they are full of cold storage produce, you have got 300 times 100 pounds to a locker; you have got 30,000 pounds in there, and when it is down to five degrees your temperature fluctuations cannot change very fast. You have got an inertia there, a flywheel effect, of the cold storage produce that is refrigerated, and your temperature rise will be considerably slower. Now I don't know how much produce there was in those lockers at any time, and I don't know how many lockers were full at the time that change-over was made.

Q221. Do you know how many lockers were filled, if I may interrupt just a minute, or what the use of the lockers

(Deposition of Mark A. Postlewaite)

was at the time you made this observation that you have testified to of a two-degree rise in less than an hour?

A. It was about a third of the lockers were occupied, were sold to customers. That is all I do know. At the time I know I requested information, but most fellows don't like to tell you, because that gives an idea of how much—

Q222. You under any conditions are not able to answer the question or to state an opinion on any basis of assumption as to what the temperature rise would have been if this change-over had required four days of men continuously going in and out of those doors to make the change-over? A. No, I could not.

Q223. You would not hazard a guess? [1160]

A. No.

Q224. By making any assumption that you wanted?

A. I don't think so.

Mr. White: The question has been answered many times. The witness has testified that he doesn't know.

Mr. Lyon: Just let the witness answer.

A. We would be so far off that it would make me look foolish, no matter what I said. That is just like guessing as to how far a Japanese balloon is going to fly. They find them in Wisconsin and the Pacific Coast and in the Pacific. That is too indefinite. I certainly would not guarantee that. I wouldn't take a contract to do any work and make out a guarantee on that. I wouldn't stick my neck out at all.

Q225. You certainly would not take a contract and guarantee the contents of a locker room, making a change-

(Deposition of Mark A. Postlewaite)

over of that character in four days, that it would not be materially above freezing, would you?

A. I would not guarantee temperatures unless I had full control of all variables, and I wouldn't have it there.

Q226. Now you would not take a contract to make a change-over of this character, then, which would require three to four days to do, without providing some auxiliary refrigeration, if you were required to guarantee the contents of the room, would you?

Mr. White: That is objected to as incompetent, irrelevant [1161] and immaterial; obviously has no reference to anything that occurred at Yamhill.

A. If I had a job that was going to have to be done for any extended length of time which I could not control, I would make some preparation to put some additional refrigeration in.

Q227. Otherwise you would not be responsible for what happened to it, would you?

A. Be responsible? I would not stick my neck out unless I had full control of all variables, which we would not have.

Q228. Now your company did make this change-over at Yamhill, didn't it?

A. We made the change-over at Yamhill.

Q229. Did you make any provision for stand-by refrigeration of the locker room during the time that that change-over was made?

A. I don't recall that we did.

(Deposition of Mark A. Postlewaite)

Q230. You don't recall having put any dry ice or any other refrigerant in the locker room to keep the temperature—

A. If there was any dry ice put in there it was put in by Mr. Trullinger himself. We didn't do so.

Q231. You didn't have anything to do with it?

A. No, sir.

Q232. The Carrier company, whom you represent, now in- [1162] structs in the installation of water defrosting units, does it not?

Mr. White: That question is objected to as utterly immaterial, as to what the Carrier Corporation now instructs.

A. The Carrier Corporation furnishes us Carrier equipment that has water headers in it.

Mr. Lyon: Q233. And also has published a booklet on the use of that system in water defrosting, I believe?

A. If they do, I haven't seen it.

Q234. You have installed such Carrier units using water defrosting, haven't you?

A. Army jobs; yes, sir.

Q235. Quite a number of them?

A. On Army jobs; yes, sir.

Q236. You know that the Carrier Corporation was sued by the Refrigeration Engineering Company, do you not? A. No, sir.

Q237. You didn't know that? A. No.

Q238. Never heard that? A. Never heard of it.

Q239. How long have you represented the Carrier Company as an agent?

A. Well, as an agent—we are not their agents now. We are dealers. We distribute their products in this

(Deposition of Mark A. Postlewaite)

area. [1163] Under the present franchise it has been—since we got it in December or January, somewhere along in there, 1938—December of 1938 or January, 1939—and previous to that I was working, as I said before, as an employee of the Electrical Products, who had the Carrier franchise for this area and other areas.

Q240. You have installed industrially, outside of Army jobs, water defrosting units, haven't you?

A. Yes.

Q241. When is the last such job that you installed?

A. Oh, this last winter.

Q242. When after this Yamhill job was the first one that you installed?

Mr. White: This examination is objected to as irrelevant and immaterial unless it appears that the water defrost systems to which counsel now refers have something to do with the water defrost systems referred to in the direct examination.

Mr. Lyon: Just answer the question, please.

(Last question read.)

A. Well, the Yamhill one was not the first one installed. It is the first one we have any record of.

Q243. When after this Yamhill one was the first water defrost system that you ever installed? That is what I am speaking of—not the Carrier system.

A. We installed one at Glacier Bay Oyster Company in [1164] North Bend, Washington.

Q244. Was that a Re-cold unit? A.. No, sir.

Q245. Whose unit was it? A. A Carrier unit.

Q246. When is the first time you became acquainted with the Re-cold unit?

A. I think it was 1941 or 1942.

(Deposition of Mark A. Postlewaite)

Q247. You never heard of it before that?

A. Well, I knew that Re-cold coils were sold by a dealer here in town, but we had never had any business dealings with this dealer and I didn't see anything in his place, but this that you mention was a Re-cold coil sold by the Northwest Baker Ice Machine Company and installed by them at the Portland Provision Company.

Q248. When was that installed?

A. Well, I couldn't tell you, but it is previous to my being called in there to do their work.

Q249. How long was that after the Yamhill job?

A. Oh, a couple of years.

Q250. So you did know of the Re-cold water defrost system within a couple of years after this Yamhill job?

A. That is right.

Q251. You have stated that when this insulated wall was put in around this Carrier unit at Yamhill in the pre-cooling [1165] room there were doors placed in the wall. Where were those doors placed?

Mr. White: I object to the question. I don't recall that the witness said doors were placed in any wall.

Mr. Lyon: Yes, he did. He said he opened them and closed them during defrosting.

Mr. White: Now, for my purpose, what doors in what wall are you referring to?

Mr. Lyon: I think the witness understands the question. You understand the question, don't you Mr. Postlewaite?

A. Well, there were doors or openings that could be closed put in the insulated wall so that we could reach or twist the handle or lever that we rotated the spray pipe with.

(Deposition of Mark A. Postlewaite)

Q252. Was that the only door that was in that insulated wall? A. That is the only one that I recall.

Q253. How big a door was that?

A. Oh, big enough to get both hands in, if you had to, with a pipe wrench.

Q254. About what dimensions?

A. Probably a half a foot by a foot.

Q255. And that door was allowed to remain open during defrosting, wasn't it?

A. It had to be, to rotate the handle.

Mr. Lyon: That is all. [1166]

Redirect Examination

By Mr. White:

Q256. Mr. Postlewaite, I would like to have you clarify your reference and description of this operating handle to which you last referred.

A. Well, it was at right angles to the axis of the pipe, the sprinkler pipe, and by moving that back and forth the sprays were moved in the same angle that the handle was rotated.

Q257. Was it necessary to go inside this unit-containing compartment to operate the handle?

A. No, you couldn't get in there. All you could get was your hand in there to rotate it.

Q258. You testified on cross examination with reference to the time required to defrost the coil, the time being different when the water pressures were different; is that true? A. That is what I meant to convey.

Q259. Would the time be greater or lesser with increasing water pressure?

A. With increasing water pressure the time would be shorter.

(Deposition of Mark A. Postlewaite)

Q260. During defrosting of the coil was the interior of the compartment within which the Carrier unit was insulated in air communication with the locker room?

A. The interior of the coil was. The outside of the [1167] housing was open and exposed where the hand-operating hold for the water sprinkler was.

Q261. You referred to the Yamhill water defrost system as not being the first water defrost system within your recollection; is that true?

Mr. Lyon: That is objected to as not being within the pleadings, and any questions directed thereto are outside the pleadings.

Mr. White: Counsel, you asked the witness a question whether he knew of any other water defrost systems—

Mr. Lyon: No, I asked him a question if he had made any after that; not before it.

Mr. White: Q262. Did you, Mr. Postlewaite, at any time when you were in the locker room, observe a temperature-measuring instrument of any kind and at the same time observe a time-indicating instrument so that you could accurately determine the rate of temperature rise?

A. No. You want to know how I did it?

Mr. White: No, if you never measured it, that is all I want to know.

Recross Examination

By Mr. Lyon:

Q263. How did you determine the rate of temperature rise, Mr. Postlewaite? I want you to have sufficient time to say everything you want. I don't want to shut you off, even if [1168] Mr. White does.

(Deposition of Mark A. Postlewaite)

Mr. White: That is inferring something that certainly is not true, as evidenced by the fact that I might have shut him off during cross examination if I had not been somewhat indulgent.

A. Well, at the start of the water defrosting period we could start from upstairs in the—not the lobby but the store proper, where you had a clock on the wall, and go down and start the defrosting water and then come back up and go into the room and come back out, and then watch the clock and then go back; and we would listen to see if anybody flushed the toilet in the meanwhile, because if they did the water pressure went to hell. That is all there is to it.

Mr. White: Q264. You observed the temperature in the locker room at the same time?

A. We would look at it, yes, and then we would come back out there and stand there and watch the clock, you see, and then we would stand right outside and listen. That is the truth.

Q265. Watching the thermometer at both ends of the cycle, too? A. That is right.

Mr. Lyon: That is all.

Mr. White: That is all. [1169]

Mr. White: In connection with the Postlewaite testimony, we offer Y-25, which is identified by Mr. Postlewaite with relation to the structure of the diffusion unit in the Yamhill plant.

Mr. Lewis Lyon: No objection.

The Court: That is the control cooling Carrier cold diffuser?

Mr. White: That is right.

The Court: All right.

(The document referred to was received in evidence and marked Y-25, Plaintiff's Exhibit.)

Mr. White: We will now call W. C. Hulse to the stand.

W. C. HULSE,

called as a witness by and in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, please.

The Witness: W. C. Hulse; H-u-l-s-e.

The Clerk: Your address?

The Witness: San Francisco.

The Court: Whereabouts?

The Witness: 754 Eighteenth Avenue. [1170]

Direct Examination

By Mr. White:

Q. Mr. Hulse, what is your present position?

A. Pacific Coast representative of the Vilter Manufacturing Company.

Q. In what business is the Vilter Manufacturing Company engaged?

A. The manufacture of refrigeration and air conditioning equipment.

The Court: Is that spelled V-i-l-d-e-r?

The Witness: V-i-l-t-e-r.

The Court: Vilter Manufacturing Company?

The Witness: Yes, sir. Here is a card.

(Testimony of W. C. Hulse)

By Mr. White:

Q. Did you ever work for a company known as Electrical Products, Consolidated? A. Yes, sir.

Q. At what time did you work for that company?

A. 1935 to 1937.

Q. Where was the company's headquarters?

A. Seattle, Washington.

Q. Where did you work?

A. State of Oregon, headquartered at Portland.

Q. What was your position as representative in Oregon?

A. I was in charge of the Oregon operations. [1171]

The Court: When did you conclude? Do you recall the month and the year?

The Witness: March.

The Court: 1937?

The Witness: That is right.

By Mr. White:

Q. Then you were continuously with Electrical Products from 1935 to March 1937?

A. That is correct.

Q. Did you do any work in connection with a job for Trullinger & Eustice at Oregon near Portland?

A. I sold the job to Mr. Trullinger.

Q. To what job do you refer?

A. The locker plant installation at the Trullinger & Eustice store in Yamhill, Oregon.

Q. Just generally what was the nature of that locker plant installation?

A. It was an installation consisting of two basic rooms, one known as the chill room, the other as the freezer.

(Testimony of W. C. Hulse)

Q. I will inquire into that later. Just give me a general description as to the nature and purpose of that job or plant.

A. It was an installation for freezing and holding fruits, vegetables and meats for various customers who would rent space. [1172]

Q. What did you have to do with this plant?

A. I sold it.

Q. You sold it to whom?

A. Fred L. Trullinger.

Q. And following this sale to Mr. Trullinger, what familiarity did you have with the job?

A. Of course during a sale you are involved with the design; after a sale you always show the customer the interest of seeing the plant, going over it with the customer. That is a courtesy you give him for his money.

Q. Who had charge of the work?

A. In what respect do you mean, charge?

The Court: Physical installation.

The Witness: Anton Broms.

By Mr. White:

Q. Who was the overall boss on the job?

A. I was.

The Court: Why can't we lead him a little bit? The long and short of it was, you negotiated the contract, had general charge of the operation—

The Witness: That is right.

The Court: —wrote and signed the contract, discussed the design—

The Witness: That is right.

(Testimony of W. C. Hulse)

The Court: —layout and need and had Broms put it in? [1173]

The Witness: That is right.

By Mr. White:

Q. Were you present at Yamhill during the construction of the plant? A. Yes, sir.

Q. Approximately how often?

A. Well, every few days.

Q. Now were you familiar with what we might call the building layout? A. Yes, sir.

Q. Will you describe it, please.

A. The location of the locker plant equipment as to the rooms was in the rear section, which had formerly been used for dry storage of the Trullinger & Eustice store. It consisted of one main room, as we called the locker room or freezer room, a small, you might say, anteroom that was used for chill purposes, the entrance of course to the freeze room being through the chill room so that the lower temperature wasn't open to the warehouse; the machine, the compressor equipment, that operated the temperature was installed in the basement underneath that.

Q. The two rooms were adjacent then?

A. Directly connected; yes.

Q. The chill and locker rooms?

A. Yes. [1174]

Q. Can you describe when first erected what the refrigeration equipment installed in each of these rooms contained? What did they contain? Take the locker room first.

A. You mean to say what was in the rooms?

Q. Yes. A. As to product or equipment?

(Testimony of W. C. Hulse)

Q. Either or both.

A. The locker room being a square was filled with rows of wooden and wire mesh locker spaces, we will say approximately 10 cubic feet each, with a little lock on it. The chill room was simply a room where it was designed to take the animal heat out of meats that came in. It had rails around it for the hanging of meat. In each room the temperature was controlled by a separate Carrier cold diffuser.

Q. Now you refer to separate cold diffusers. Can you be more specific as to what and where they were?

A. In the chill room we used a 15 K-4 ceiling mounted type Carrier diffuser which operated on an air switch with what we called—well, it is a humidity control.

Located in the same room but on the floor and in a corner was a 15 Q-2 Carrier cold diffuser, which was installed to maintain the lower temperature of the freezing room, or locker room as you call it.

Q. Is that diffuser to which you now refer in existence? [1175]

A. Yes.

Q. Where?

A. In the same locker plant.

Q. Were you present when this plant went into operation, first went into operation?

A. Yes, sir.

Q. Do you recall whether at that time produce had been placed in the locker room?

A. Well, I remember the first piece of what you might call produce, when that was put into the locker.

Q. Had customers started using the lockers?

A. No. The first material that went in was before the customers actually had used it.

The Court: When was that? When did the first material go in?

(Testimony of W. C. Hulse)

The Witness: November 11th.

The Court: That was a turkey?

The Witness: That is right.

The Court: It is still there?

The Witness: That is right.

The Court: When did the customers start using it?

The Witness: I would say within a day or two after that first famous turkey went in.

By Mr. White:

Q. When to the best of your knowledge and recollection [1176] was the locker plant put in operating condition?

Mr. Lewis Lyon: Objected to as already asked and answered.

The Court: Overruled.

The Witness: Well, it actually was started on its pull down to final temperatures November 11th or—as to the time of day, I think when the turkey was put in it wasn't—

Mr. White: Perhaps I can clarify that.

Q. When I say “operating condition” I mean when was it first put into operation with the locker room brought down to refrigerating temperatures.

A. It was down to temperature on November 11th.

Q. Was any equipment used for defrosting the refrigerating equipment, specifically the diffuser unit?

The Court: There are two diffusers now. I didn't know that.

Mr. White: That is correct, your Honor.

The Court: What method of defrost did you put on the big one on the floor in the corner?

(Testimony of W. C. Hulse)

The Witness: Water defrost.

The Court: When you installed it?

The Witness: It was sold hot gas.

The Court: Did you use hot gas?

The Witness: No.

The Court: What method of defrost did you have on the [1177] other ceiling unit?

The Witness: That is a high temperature unit. You don't require defrosting.

The Court: You don't require defrosting?

The Witness: No. The coil temperature is above the freezing temperature normally and then of course there is the off peak, if it does frost a little it is so close to the defrosting temperature that the minute that it is off on an off-cycle the ice drops off as water.

The Court: You shut it off then merely?

The Witness: No, it is automatic.

The Court: It is automatic?

The Witness: Yes.

The Court: So that the temperature of the chill room was above freezing?

The Witness: Well, it was designed to be above freezing. At the time we started the freezer plant we got into a little difficulty there and it got below freezing. That was the reason for the insulated section around the floor mounted, or the 15 Q-2 cold diffuser.

The Court: When was that put in?

The Witness: Within two weeks.

The Court: Within two weeks?

The Witness: After the original installation.

The Court: After you put the turkey in? [1178]

The Witness: That is right.

(Testimony of W. C. Hulse)

By Mr. White:

Q. As I recall your answer to the question concerning the hot gas, being that you did not use hot gas, what do you mean by use, if I am correct in that respect?

A. It was not turned over to the customer with a hot gas defrosting system on it.

The Court: Was it turned over to the customer with a water defrosting system?

The Witness: Yes, sir.

The Court: Do you know anything about that water defrosting system?

The Witness: I think I know quite a little about it.

The Court: Do you know how it worked?

The Witness: Yes, sir.

The Court: What is this fellow's name, Tony?

The Witness: Broms.

The Court: Did Tony Broms consult you about it?

The Witness: Yes, sir.

The Court: Do you remember when you installed the equipment there with the hot gas in it, in relation, let us say, to November 11th? You have that date fixed in your mind apparently as turkey day.

The Witness: That was the day it started. That is easy to remember. [1179]

The Court: With relation to that day, when did you have the equipment in there as you originally contracted with them to put it in with hot gas?

The Witness: A few days before that.

The Court: A few days?

The Witness: Yes.

The Court: Then you put the hot gas on?

(Testimony of W. C. Hulse)

The Witness: That is right—well, now, let me understand it. During the time that they first brought the machinery there and were installing it, after all it isn't a big job, it didn't take a long time, I wasn't there, the only thing I knew about anything is that—well, it is a receiver condenser on that type of equipment. We had some trouble with it and replaced it, and Tony came and asked about changing it to water defrost. We discussed that and decided that that would be the best operation under those conditions.

The Court: That was before you turned it over to Trullinger & Eustice?

The Witness: Before we turned it over to Trullinger & Eustice.

The Court: You did put the system in, however, with the hot gas and operated it?

A. Well, when I say operated, I wouldn't say it was ever down to temperature. It was turned on.

The Court: It was turned on? [1180]

The Witness: That is right.

The Court: Did the customer complain?

The Witness: No, it wasn't the customer's property as of that time.

The Court: You decided to change it?

The Witness: After they had the difficulty; yes.

The Court: Did you make some change in your contract? The contract calls for hot gas.

The Witness: The contract never was changed on its face. The agreement on it was just a matter of talking to Mr. Trullinger.

The Court: Then you put the water defrost in?

(Testimony of W. C. Hulse)

The Witness: That is right.

The Court: And turned it over to them with the water defrosting apparatus?

The Witness: That is correct.

The Court: In the open chill room?

The Witness: Yes.

The Court: And within two weeks—

The Witness: Under those conditions when it was in the open chill room of course he complained, rightfully so, because the cold diffuser unit itself was bringing the temperature of the chill down below its guaranteed operating point.

The Court: Then when you put the water on it it froze?

The Witness: That had nothing to do with it. [1181]

The Court: Did the water freeze when it was below freezing?

The Witness: No, no.

The Court: It did not?

The Witness: No. After we put the insulated chamber around it of course—during all of this time the freeze room itself would operate all right.

The Court: Yes, I understand.

The Witness: It was only the chill room where it was creating difficulty. As soon as we got the unit insulated away from the chill room then the customer was satisfied. By Mr. White:

Q. Why didn't the customer want the chill room brought down to as low a temperature as existed while the diffuser was openly exposed to the room?

Mr. Lewis Lyon: That is objected to as calling for a mental conclusion of a party not here.

(Testimony of W. C. Hulse)

The Court: Yes. I think it probably does.

We will have a short recess.

(Short recess.) [1182]

Q. Mr. Hulse, did the contract with the customer involve any specifications with respect to locker and chill room temperatures? A. Yes, sir.

Q. What were they, please?

A. Thirty-five degrees in the chill room; 10 degrees in the locker room.

Q. In other words, the refrigeration equipment installed was to operate—to maintain those temperatures?

A. That is correct.

Q. Did it maintain that temperature condition in the chill room when first operated? A. No.

Q. What temperature condition existed in the chill room?

A. It got a lot lower. We got down into the 20s.

Q. What is the basis for your statement that it dropped as low as the 20s?

The Court: Isn't that cross examination?

Mr. Lewis Lyon: That is objected to.

Q. By Mr. White: Why? How did you know?

Mr. Lewis Lyon: That is objected to as cross examination.

The Court: One witness testifying to a fact is sufficient to prove it. You are not going to cross-examine him, are you?

Q. By Mr. White: Did you make any temperature measure- [1183] ments in the chill room?

A. Yes, sir.

Mr. Lewis Lyon: The same objection.

The Court: Overruled.

(Testimony of W. C. Hulse)

Q. By Mr. White: How did you make those temperature measurements? A. With a thermometer.

Q. And where was the thermometer?

A. On the wall.

Q. Did you have any other means of obtaining an indication of the temperature condition in the chill room?

A. Oh, yes, we froze the drain water from the 15 K4 diffuser in the bucket we had to catch it originally.

Q. The 15 K4 diffuser being the one—

The Court: The ceiling?

Q. By Mr. White: —identified as having been mounted on the ceiling? A. That's correct.

Q. For what purpose was that water used?

A. That water was really waste water, but before we had it worked out so that it drained out of the room, we just ran it into a bucket, and that water froze up.

The Court: That is the water from the ceiling?

The Witness: From the ceiling unit, yes.

The Court: From the diffuser? [1184]

The Witness: No. That coil operates normally right at or just above or slightly below the freezing temperature, and as it cycles the slight frost that gets on to it will defrost and it ran down through the drain and into the bucket.

Q. By Mr. White: Was that the humidifying water?

A. Well, that unit was designed to maintain high relative humidity and a temperature of 35 degrees. You couldn't say that the water was the humidifying water. It was the water that the unit had actually taken out of the air, which would be really the reverse.

The Court: That water froze?

(Testimony of W. C. Hulse)

The Witness: Yes, in the drain bucket.

The Court: But the defrosting water, on the other hand, did not freeze?

The Witness: No, sir.

Q. By Mr. White: While the temperature condition which you have described existed in the chill room, the diffuser unit was defrosted by water; is that correct?

The Court: By "diffuser unit" you mean the one on the floor?

Mr. White: The one on the floor.

The Witness: Yes.

Mr. Lewis Lyon: That is objected to as leading, your Honor.

The Court: Well, he has answered it. [1185]

Mr. Lewis Lyon: I move to strike the answer.

The Court: Motion denied.

Q. By Mr. White: Will you describe the water defrosting means?

A. The water defrosting consisted of a pipe run through the cold diffuser, that is, the 15 Q2 cold diffuser, just over the top of the coil section. We merely drilled a hole into the casing, ran it through, and fastened the dead end of the pipe to the opposite end of the diffuser. On the outside we had—

Q. May I interrupt. How was it fastened at the dead end?

A. With a pipe strap, just an ordinary pipe strap.

Q. Have you personally seen that pipe strap?

A. It was in the diffuser the last time I saw it.

Q. When was that? A. August of '45.

(Testimony of W. C. Hulse)

Q. Continue, please.

A. Just at the outside end of the perforated pipe, we had an el, a short piece of pipe some eight inches long, attached to a hose and had enough length in it to permit us to rock the diffuser, or, the defroster pipe back and forth so that the spray could be concentrated evenly over the entire coil area, on the top part of the coil area. That pipe ran on down to the floor.

Q. What pipe? [1186]

A. I should say the hose—pardon me—ran on down to the floor, where underneath that, directly underneath the unit it was connected to the main city water. At that point there was a three-way stop and drain valve, as they are normally called.

Q. Now, what specifically was the relation between the city water line and the hose?

A. Well, it was a continuation of it whenever the valve, the three-way valve, was open.

Q. That connected through the valve?

A. That's correct.

Q. Now, what happened to the water which was sprayed over the coil from this spray pipe overlying?

A. Well, you mean where did it go after?

Q. Yes.

A. After it had done its work of defrosting or melting the ice it went right out through the bottom of the unit out the drain.

Q. Will you describe the bottom of the unit, please?

A. Well, it is a metal drain pan, grooved, slanted towards the center, where there was a drain pipe that ran directly through the floor.

(Testimony of W. C. Hulse)

Q. Where did the pipe go after it passed through the floor?

A. Well, originally it didn't go any place, we just ran [1187] it out on the ground. The basement below that store was just dirt. Until such time as it made a big mud puddle down there, why, we just let it run on the floor. Finally they put an extension on to it and ran it out into the back yard. [1188]

Q. I will ask the witness to refer to Exhibits Y-14 and Y-15, and ask you if you are familiar with what these photographs appear to show.

The Court: Isn't this merely cumulative, counsel?

Mr. White: It is with relation—

The Court: To what they show. In the first place you have the pictures, in the second place you have the stipulation concerning the pictures, and in the third place you have the valve and you have Tony Broms' testimony who explained this in detail.

Mr. White: It is cumulative with relation to Broms.

The Court: If you consider it important, you can go ahead and put it in.

By Mr. White:

Q. Now, Mr. Hulse, while the floor carried diffuser was exposed in the chill room, as you have described it, did you personally then operate this water defrost system? A. Yes, sir.

Q. Now will you describe what you did in operating this defrost system?

A. You mean to just go through the process?

(Testimony of W. C. Hulse)

Q. Yes. Explain the steps through which you went in defrosting.

A. The first operation, we stopped the liquid supply using the stop valve just ahead of the expansion valve, [1189] stopped the fan—

Q. May I interrupt. When you say liquid supply, you mean refrigerant? A. That is right.

Q. Yes.

A. Stopped the fan, closed the damper on the return air side of the diffuser. The damper was over in the freezer room.

Q. The locker room?

A. Yes, in the locker room. We closed it so we didn't splash water out into the locker room.

Sometimes we would turn the compressor off, sometimes not. Then turned the water on. At first we used to be careful to look through the inspection plate hole in the side of the unit to be sure that all the ice was off. As soon as it was we just reversed that operation.

Turning the water on of course required that you go downstairs, and when you turned it off—that is the defrosting water—you of course opened the drain cock so that the water would drain out of the defroster line.

Q. Now first you opened the valve, is that correct?

A. To turn the water on; yes, sir.

Q. Then what did you do after you opened the valve?

A. After you have defrosted then you reverse it.

Q. No, I am just asking what was your next step after [1190] you opened the valve down in the basement.

A. We go back up and rock the defroster so that it covered the coil, and you look through the hole to watch to see how well you are doing the job.

(Testimony of W. C. Hulse)

Q. Then that spraying operation continued how long?

A. Well, normally four to six minutes.

Q. And what observation did you make in the coil while the defrosting was going on? You referred to having peeked in.

A. Just watch the ice disappear.

Q. Did you observe the presence or absence of ice at the end of the defrosting operation?

A. There wouldn't be any ice then.

Q. What happened to that ice?

A. The water melts it and it goes away down through the drain.

Q. Now having completed the operation, the spraying operation, what did you then do? The water is still running out of the spray pipe.

A. Go down and drain the water, open the drain cock to bleed the line back, go back up open your damper in your locker room to the return air, turn your fan on, turn your thermal expansion valve on, and if the machine had been turned off you turn the machine on.

Q. And when you say drain the water out of the line [1191] by opening the drain cock, to what line do you refer?

A. The line and hose and the perforated pipe through the diffuser unit.

Q. And that water drained where?

A. The water in the vertical section would drain back into the basement. The drain pipe itself was slightly slanted. It would drain into the unit the minute the valve was open and the air could come up through the pipe.

Q. Did you instruct anyone else how to conduct the defrosting operation?

A. Yes, sir.

Q. Who?

(Testimony of W. C. Hulse)

A. Mr. Trullinger, Mr. Eustice, some of his employees, and later customers we took out to show the job to.

Q. Now you referred to a damper at the bottom air inlet from the locker room to the diffuser. What was the purpose of that damper?

Mr. Lewis Lyon: That is objected to as a misquotation of the witness' testimony.

The Court: He didn't say it was at the bottom.

Mr. White: That is right.

Q. You referred to a damper which, as I recall it, was closed.

A. That damper was closed and closed the return air duct into the bottom of the unit, and was installed merely to [1192] keep the water from splashing during the defrosting operation out into the locker room.

Q. It was normally open then?

A. During the running operation; yes.

The Court: If it splashed into the locker room what would happen to it?

The Witness: It made an ice-rink.

The Court: It made an ice-rink? It froze?

The Witness: Yes, sir.

The Court: Then do you know the temperature of the room inside the insulated unit?

The Witness: You mean the locker room or the little room?

The Court: The little room where the freezer was.

The Witness: That temperature was always at the locker room temperature or below.

The Court: Was it there when you were defrosting?

(Testimony of W. C. Hulse)

The Witness: It would still be always at that range.

The Court: It would be at that or below?

The Witness: That is right.

The Court: But the water that went into one room which was higher than this room froze and the one that went into the little insulated room didn't freeze?

The Witness: No, it would freeze. The thing is, it is the quantity of water that comes that stops it from freezing as it goes through the unit over the coil. In other words, [1193] there is a temperature differential between the ice and the temperature of the water coming in, and as long as that water comes in fast enough it takes the ice away, melts it and takes it right on out and it drops through by its velocity weight. If that water splashes out of that unit, as sometimes it did, through cracks it would freeze on the floor underneath of the unit, the same as it did over in the locker room if it bounced out through that opening.

By Mr. White:

Q. On what floor?

A. The floor right directly underneath the 15 Q-2 cold diffuser, inside of the insulated area, the little cover room we put around the unit.

Q. Now did you personally operate the water apparatus after the insulated wall was placed about the unit?

A. Yes, sir.

Q. And about how often did you have occasion to operate it?

A. Well, at first every few days, later on why only occasionally when we had a customer to show the installation to.

(Testimony of W. C. Hulse)

Q. And how did its operation by you after the wall was placed about the unit compare with the description you have given concerning your operation of it before?

A. As far as the actual defrosting of the coil is concerned, [1194] the insulated wall around the case had no effect upon the defrosting of the unit. The only thing that wall has in this thing is that before we put that—

The Court: His question was, how did you operate it as compared to before the wall was in.

The Witness: When we put the wall around it we put an extension handle onto the rocker of the diffuser so that it could be done without having to reach in through the insulated area.

By Mr. White:

Q. Why did you put this insulated wall around the unit?

A. To protect the chill room from the lower temperature of the cold diffuser.

Q. Did this water defrost system at the times to which you have referred and within your operation operate satisfactorily?

Mr. Lewis Lyon: Objected to as calling for a conclusion of the witness.

The Witness: Yes, sir.

The Court: Well, so far as you know.

The Witness: Well, I answered the question that way because I would say that it was successful if it would take the ice off within that period, and I to my knowledge have seen the thing defrost and run three or four days without having to defrost again. [1195]

The Court: All right.

(Testimony of W. C. Hulse)

By Mr. White:

Q. Now before the insulated wall was placed about the unit, did you measure the temperature in the locker room? A. Yes, sir.

Q. And how did you measure the temperature?

A. Thermometers.

Q. What did you find the temperature to be?

A. It met the guarantee.

Q. And what was that? A. Ten degrees.

Q. Ten degrees Fahrenheit? A. That is right.

Q. Any variances from ten degrees?

A. Oh, naturally. As the machine would go through its cycling range there would be a few degrees either way, but we would consider it as the guarantee of ten degrees because any refrigeration fluctuates from one temperature to another.

Q. When you say "few degrees" what do you mean?

A. Two to three either way.

Q. And did you measure the temperature conditions in the locker room after the insulated wall was placed about the unit? A. Yes.

Q. What did you find them to be? [1196]

A. The same.

Mr. White: I will ask the Clerk to identify this drawing, please, as Plaintiff's Exhibit Y-28.

(This document referred to was marked Plaintiff's Exhibit Y-28 for identification.)

By Mr. White:

Q. Mr. Hulse, were any drawings made at the time, or have there been any drawings made to your knowledge,

(Testimony of W. C. Hulse)

of the actual water defrost system installed? In the installation of the job were any drawings prepared?

A. Not to my knowledge. [1197]

Mr. Lewis Lyon: Objected to as a complex question, your Honor. I don't know what an answer to it would mean.

The Court: Well, he answered: No, not to his knowledge. So apparently the witness understood it.

Mr. Lewis Lyon: Well, it had two propositions; one was any time, and one was at the time the installation was made.

The Court: His answer to both, then, is no.

Mr. Lewis Lyon: That is my understanding.

Q. By Mr. White: I will hand you a pencil drawing, identified as Plaintiff's Exhibit Y-28, and ask you if you are familiar with it.

A. Yes, sir.

Mr. Lewis Lyon: Your Honor, I think he foreclosed himself from that answer by the previous question: Was any drawing ever made of the system at any time.

Mr. White: Well, what I am talking about—I will be glad to clarify that—I mean engineering drawings, or was the plant installed, the water defrost system installed pursuant to—

The Court: That isn't what you asked him.

Mr. Lewis Lyon: That isn't what you asked him.

Q. By Mr. White: The point I would like to bring out, to clarify it, is: Are there, to your knowledge, any original drawings showing actually the details and layout

(Testimony of W. C. Hulse)

of that water defrost system, made in the course of the work done by [1198] Electrical Products?

A. No, sir.

Mr. Lewis Lyon: That is objected to as already asked and answered.

Mr. White: Well, I am clarifying it.

The Court: Go ahead. The objection is overruled. Go ahead and ask him some more questions.

Q. By Mr. White: Now, Mr. Hulse, will you identify, if you can, the drawing which you now hold?

A. This is—

Mr. Lewis Lyon: That is objected to on the ground there is no foundation laid for it.

The Court: May be is laying the foundation. I don't know. He asked him to identify it.

The Witness: This is a sketch that I drew up, myself.

Q. By Mr. White: When did you draw it?

A. The 19th day of August.

The Court: 1946?

The Witness: 1946, right.

Q. By Mr. White: What does that sketch show?

Mr. Lewis Lyon: That is objected to on the ground that the sketch is the best evidence of what it shows.

The Witness: Well, it shows—

The Court: Just a moment.

The Witness: Pardon me. [1199]

The Court: I think the sketch is the best evidence of what it shows. I think your question is improper, but you can ask him what he was attempting to show.

Q. By Mr. White: Well, is this a sketch—

(Testimony of W. C. Hulse)

The Court: What were you attempting to show when you drew the sketch?

The Witness: I was attempting to show in one part the layout, the relationship of the rooms—the diffusers to the rooms, and the approximate location of the defrosting equipment; an elevation, and an end-view of the unit itself with its defroster, in its relation to the freezer room.

Q. By Mr. White: You were attempting to illustrate your recollection of it?

A. That's correct.

The Court: You drew that entirely from recollection?

The Witness: That's right.

Q. By Mr. White: Now, what unit—

The Court: The last time you had seen that in operation was when? In 1937?

The Witness: That's correct.

Q. By Mr. White: Then the drawing is illustrative of your recollection as of that time; is that correct?

A. That's correct.

Mr. Lyon: I would like to ask one question on this, if I might, to clarify the record right there. [1200]

Isn't it a fact that before you drew this sketch you went into the Trullinger & Eustice store and inspected what was there?

The Witness: That's correct.

Mr. Lewis Lyon: Inspected the room set-up and the 15Q2 cold diffuser, as it is now located in the locker room?

The Witness: That's right. It is different from this drawing.

(Testimony of W. C. Hulse)

Mr. Lewis Lyon: It is the same unit, is it not?

The Witness: That's correct.

The Court: You can cross-examine him. I suppose you will get around to asking him if he ever saw a picture of Precool, or, what do you call it?

Mr. Lewis Lyon: Recold.

The Court: —Recold before he drew that?

Mr. White: We offer this sketch as Plaintiff's Exhibit Y-28.

Mr. Lewis Lyon: Objected to on the ground there is no proper foundation laid for it; further, it has no probative value whatsoever, not being a sketch made at the time of the supposed operation or installation, or it isn't in any way really connected with the operation, and is a picture that anybody might draw at any time.

Mr. White: It is not anybody. This witness drew it to illustrate his recollection of what he actually saw. [1201]

The Court: Of course, if counsel desired, they could now have the witness on the witness stand go to the blackboard and ask him to draw what his present recollection is of the situation at that time, and that would be admissible. I think that all goes to the weight of it, rather than to its admissibility. I would observe that its weight is not overwhelming; I mean, nine years, and he has probably installed thousands of pre-cooling or refrigerating units in the meantime.

The Clerk: Is it admitted?

The Court: Admitted in evidence as Exhibit Y-28.

(Thereupon, the document referred to was marked as Plaintiff's Exhibit Y-28, and was received in evidence.)

[Note: Plaintiff's Exhibit No. Y-28 will be found in the Book of Exhibits at page 1241.]

The Court: Is that all of the direct?

Mr. White: No, your Honor. There is one matter concerning—

The Court: Will you be long? If you will, we will recess now.

Mr. White: I think we should finish in five or ten minutes.

The Court: All right.

Q. By Mr. White: Mr. Hulse, when do you recall last having seen the Yamhill Locker Plant and Refrigerating equipment with the water defrost system installed and the diffuser unit enclosed, as you have testified?

The Court: He just testified to that. I asked him a [1202] moment ago, and he said he saw it in 1937.

Q. By Mr. White: When in 1937?

A. October.

The Court: We will now recess until 2 o'clock.

(Whereupon, at 12:03 o'clock p. m., a recess was taken until 2:00 o'clock p. m. of the same day.) [1203]

(Testimony of W. C. Hulse)

Los Angeles, California; September 25, 1946; 2.00 o'clock p. m.

The Court: Proceed.

W. C. HULSE,

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. White:

Q. Mr. Hulse, during your operation of the water defrosting of the floor unit when it was in the insulated compartment, was there any change of temperature in that compartment?

Mr. Lewis Lyon: That is objected to on the ground the witness hasn't been qualified to answer the question.

The Court: I do not think there is a sufficient foundation for him to give an answer to that question. Objection sustained.

By Mr. White:

Q. Was there any damper door installed on the air outlet opening from the floor unit into the locker room?

A. The air outlet, the one at the top that discharged?

Q. That is right. A. No.

Q. Will you state whether or not you were in Portland on October 6, 1936? [1204] A. No.

Q. I beg your pardon, October 6, 1937.

A. Yes.

Q. Can you identify the signature on Exhibit Y-27?

A. That is my signature.

Mr. White: That Exhibit Y-27 is offered in evidence.

(Testimony of W. C. Hulse)

Mr. Lewis Lyon: Objected to on the ground there hasn't been shown any materiality whatsoever.

The Court: I cannot see the materiality of it. Was he in Portland October 6, 1937? What has that to do with water falling down over a coil?

By Mr. White:

Q. At that time had you inspected the Trullinger & Eustice plant?

A. That was the purpose of being in Portland at that time.

Mr. Lewis Lyon: I move to strike the answer as not responsive to any question asked the witness.

The Court: I think it answers it.

Did you inspect it?

The Witness: Yes, sir.

Mr. White: The exhibit, Y-27, now is offered in evidence.

Mr. Lewis Lyon: Same objection.

The Court: Same ruling. Objection sustained [1205]

Mr. Neave: Your Honor, it seems to me that this is corroborative of his having been in Portland on that day.

The Court: What is the materiality of it? What is the materiality of his inspection on that day?

Mr. Neave: It establishes the fact that he did inspect it on that day, and he has testified earlier that he was there in October, 1937, and he saw it operate.

The Court: I think he testified he was there in the fall of 1937, or in '37.

Mr. Neave: I think he said October.

(Testimony of W. C. Hulse)

The Court: But what if he was. What if he did inspect it? What is the materiality of that? What did he see?

Mr. Neave: He has already testified that in October, 1937, he saw it operate, saw the water defroster operate and operated it himself.

The Court: I don't recall his testimony to that effect.

Mr. Neave: Well, we can ask him.

Q. By Mr. White: Mr. Hulse, when you saw the plant in October of 1937, did you see the water defrost system, the apparatus?

A. Yes, sir.

Q. Did you at that time operate it?

A. I did, sir.

Q. Did it at that time operate satisfactorily?

A. Yes, sir. [1206]

Mr. Lewis Lyon: That is objected to as calling for a conclusion of the witness.

The Court: Objection sustained. Did it operate?

The Witness: Yes, it did.

The Court: Was it in the enclosed insulated room at that time?

The Witness: Yes, sir.

The Court: Did you operate it?

The Witness: I operated it, yes, sir.

The Court: You operated it in the same way that you described before?

The Witness: The same as I described.

The Court: How long a time did it take to defrost it at that time?

(Testimony of W. C. Hulse)

The Witness: About the same period as before, four to six minutes:

The Court: Four to six minutes?

The Witness: That's right.

Mr. White: We again offer the exhibit Y-27 in evidence.

The Court: Admitted.

Mr. White: As establishing the time.

The Court: Objection overruled. Admitted. The objection you were about to make is overruled.

Mr. Lewis Lyon: If I was going to make one. [1207]

(The document referred to was marked as Plaintiff's Exhibit Y-27, and was received in evidence.)

[Note: Plaintiff's Exhibit No. Y-27 will be found in the Book of Exhibits at page 1240.]

Cross Examination

By Mr. Lewis Lyon:

Q. Mr. Hulse, you recall having testified by deposition in this matter starting at Portland, Oregon, on the 23rd of August, 1945?

A. I don't understand.

The Court: Do you recall having testified in a deposition?

The Witness: Oh, yes; yes.

Q. By Mr. Lewis Lyon: Do you recall that at that time you represented to Mr. White and to myself that you couldn't conclude that deposition at that time because you were immediately called away and had to leave immediately? A. That's correct.

(Testimony of W. C. Hulse)

Q. Isn't it a fact that you didn't leave immediately but were in Portland all the next day?

A. If you will recall at that time, transportation was really a difficult problem. We were looking for—

The Court: Well, did you stay in Portland?

The Witness: Yes, I did.

Q. By Mr. Lewis Lyon: And you didn't leave that day at all?

A. I left the next afternoon on the—well, it was the next afternoon train. I forget what the name was; the [1208] Cascade or the Oregonian.

The Court: Or the Yamhill Special?

Q. By Mr. Lewis Lyon: Isn't it a fact that at the giving of that deposition in Portland you produced a document which was identified as Y-13?

The Court: I think he has the original deposition there?

The Witness: Would you repeat the question?

Q. By Mr. Lewis Lyon: Give him the question again. (The question was read.)

A. I don't believe I produced this. I believe that this had been sent to Mr. White some time prior and that he produced it at this meeting. [1209]

By Lewis Lyon:

Q. Isn't it a fact, Mr. Hulse, that you personally got that from the files of the Electrical Products Corporation in Seattle?

A. That is correct.

Q. Well then it is correct that you produced it?

A. Technically so.

(Testimony of W. C. Hulse)

Q. Now isn't it also a fact that on your direct examination in Portland, with reference to that document, that you testified as follows:

"Q. By Mr. White—"

The Court: Let him read it through first.

The Witness (Examining document)—

The Court: You have the original there?

Mr. Lewis Lyon: I have only my copy.

The Court: Better give him the original.

(The document referred to was passed by the witness.)

The Court: Do you want him to read from line what to what?

Mr. Lewis Lyon: Beginning with Question 54 and ending with the answer to Question 55.

The Court: When you have read it through, will you indicate and then counsel will ask you a question.

The Witness: Yes, I have read it.

Mr. Lewis Lyon: And that testimony, for the purpose of [1210] the record, is as follows:

"Q. I show you what appears to be an Electrical Products, Consolidated, invoice identified as Plaintiff's Exhibit Y-13, and ask you if you have seen it before and what it is, if you know.

"Mr. Lyon: Just a moment. Let me see that before you answer. Objected to on the ground that there has been no proper foundation laid.

"A. An invoice—

"Mr. Lyon: That is not the question you were asked. (Question read.)

"A. Yes, I have seen it before.

(Testimony of W. C. Hulse)

“Q. Do you know what it is?

“A. It is a notation of a final payment received from Fred L. Trullinger for the locker plant at Yamhill, Oregon.”

Q. You so testified? A. Apparently I did.

Q. And it is not true, is it?

A. No, it states within itself that it is a payment for the original. The original down payment.

Q. Are you acquainted with Mr. Carl E. Wilde, sitting here? A. Yes, sir. [1211]

Q. When did you first meet Mr. Wilde.

A. In 1939 or '40.

Q. Was that at the R. W. Weidline Company in Los Angeles? A. That is correct.

Q. Located on South Los Angeles Street, I believe it was, wasn't it? A. That is right.

Q. And at that time were you and Mr. Wilde not operating as co-receivers for the W. R. Weidline Company?

A. I believe for a time we were co-receivers for the R. W. Weidline Company.

Q. During that period of time do you recall any conversation that you had with Mr. Carl Wilde with respect to the Recold water defrost as introduced by the Refrigeration Engineering and by Mr. H. T. Jarvis?

A. I wouldn't know of any specific instance, no.

Q. Do you remember having a conversation with Mr. Wilde in which you condemned any system of water defrosting, claiming that you yourself had tried it, that it would not work satisfactorily, even with all the engineering assistance of the company that you had behind you, and

(Testimony of W. C. Hulse)

furthermore you knew that Mr. Jarvis—the Recold system would not work? A. That is not true.

Q. You say that is not true? [1212]

A. Positively.

Q. Did you at the Weidline Company at any time meet Mr. H. T. Jarvis?

A. I have known Mr. Jarvis for years.

Q. Did you meet him at the Weidline Company?

A. Yes.

Q. Do you recall a meeting at the Weidline Company at which were present Mr. Vering, Mr. R. W. Weidline, his two brothers, Mr. Carl Wilde and Mr. Gessell, at which time Mr. Jarvis brought in a Recold unit and demonstrated the water defrosting system?

A. That never happened in my presence.

Q. That never happened? A. That is right.

The Court: At any time?

The Witness: At any time.

By Mr. Lewis Lyon:

Q. Then you don't know of any conversation that was had at any such meeting, do you? A. That is right.

Q. Did you at any time at the Weidline Company make a statement to Mr. Jarvis or in Mr. Jarvis' presence that you knew that water defrost would not work, that you tried it and abandoned it and it wouldn't work?

A. I have never made that statement. [1213]

Q. To anyone? A. To anyone.

Q. Or anything of that character?

A. My statements have always been to the contrary of what you asked.

(Testimony of W. C. Hulse)

Q. Your statements have always been that water defrost would work?

A. And that I did make it work.

Q. And that it worked satisfactorily?

A. That is right.

Q. And never made any statement to the contrary?

A. That is right.

Q. Now, Mr. Hulse, you have testified that this system of hot gas method was installed in the Yamhill installation first, is that correct?

A. Will you repeat that?

The Court: You put in the hot gas first at Yamhill?

The Witness: That is right.

By Mr. Lewis Lyon:

Q. Did you ever see it while it was so installed?

A. I can't say that I did.

Q. Do you know how long it was installed?

A. Not very long.

Q. Do you know how long?

A. It couldn't have possibly been over two or three [1214] days.

Q. But you never saw it?

A. That is correct.

Q. You don't know when it was first installed?

A. I do not quite understand what you mean, when it was first installed.

Q. You don't know when the installation was first set up with hot gas on it, do you?

A. I was there when we started to erect the job, yes.

Q. But you don't know when it was first installed with hot gas, when the system was started in use with a hot gas defrosting system?

A. You were asking for a date?

The Court: Just a minute. Read the question.

(Testimony of W. C. Hulse)

(The question referred to was read by the reporter, as follows:

“Q. But you don’t know when it was first installed with hot gas, when the system was started in use with a hot gas defrosting system?”)

The Court: Do you understand the question?

The Witness: Not exactly.

The Court: What do you not understand about the question?

The Witness: You see, there is a period of starting. You start erection, you go through a period of erection, cer-
[1215] tain tests, then you go into your final test run, then you go into your pull down period. Just which of these periods are you talking about? [1216]

The Court: Do you have a period when you install something?

The Witness: That’s right.

The Court: You know when it is installed?

The Witness: Yes, we know when it is installed.

The Court: Read the question again.

(The question referred to was read as follows:

“Q. You don’t know when the installation was first set up with hot gas on it, do you?”)

The Court: Do you understand that?

The Witness: Well, may I explain it this way?

The Court: Is there any word in it that you don’t understand?

The Witness: What I mean is, I don’t quite. As to the equipment, I was there when we delivered the machinery; when we started to work, when we put the machines

(Testimony of W. C. Hulse)

on the foundation, there are periods in between in the construction when I am not there. I didn't exactly see them operate with the hot gas, and I was not there when they had it installed and when the room was down to temperature; I wasn't there when the room was brought down to temperature.

The Court: In other words, you were not there when they hooked it up?

The Witness: That's correct.

The Court: Does that answer your question? [1217]

Do you know when they hooked it up?

The Witness: Oh, yes.

The Court: When?

The Witness: Well, the exact date I couldn't tell you, just exactly what day. It was right after the first of the month because, as I remember, we were three days getting the water defrosting system installed, and it took us about a day to install the condenser receiver, so it was five days approximately before we started the final pull-down on the water defrosting.

Q. By Mr. Lewis Lyon: You know, of your knowledge, as you have testified, that the room was never brought down to temperature using the hot gas method of defrosting?

A. That is correct.

Q. How do you know that?

A. I didn't see it brought down to temperature, and, of course, I am relying there on the statement of our service man, Tony Broms.

Q. You know, as a matter of fact, do you not, that until the coils of the system had frosted up because the system had been put in use, that there would be no reason for trying to use a defrosting system, don't you?

(Testimony of W. C. Hulse)

The Court: Let me hear that.

The Witness: I will have to, too.

(The question was read.) [1218]

The Witness: That question requires not a direct one-word answer.

Q. By Mr. Lewis Lyon: Can't you answer the question "Yes" or "No," and then give your explanation?

A. You will have to read it once more, if I do.

(The question referred to was reread.)

A. That's true, because the coils will not start to frost at a high temperature, but it does not indicate that they were anywhere near down to normal operating of the guaranteed temperatures.

Q. You know then, as a matter of your own knowledge, that the system was put in use as it was contracted for. You don't know, of your own knowledge, as to what the conditions of operations were; isn't that a fact?

Mr. White: As of what time?

Mr. Lewis Lyon: As of the time it was installed.

The Witness: Your question brings up—

The Court: No, just answer the question.

The Witness: I don't understand it, then.

The Court: All right. Read the question.

(The question was read.)

Mr. Neave: It seems to me to be like two questions, your Honor.

The Court: Are you objecting?

Mr. Neave: I am. [1219]

The Court: Upon what ground?

Mr. Neave: That the question is a double-barreled question, and he can't answer it one way or the other unless it is broken up.

(Testimony of W. C. Hulse)

The Court: The objection is sustained.

Q. By Mr. Lewis Lyon: Do you know, Mr. Hulse, of your own knowledge, that the system was installed as called for by the contract, using the hot gas system of defrosting?

A. It was originally installed that way, yes, sir.

Q. And you don't know, of your own knowledge, how long it remained so installed, do you?

A. Not to an exact date.

Q. You don't know, of your own knowledge, what the conditions were of operation, as it was installed, do you, originally?

A. No.

Q. Now, isn't it a fact that instead of leaving Portland in March or in the spring of 1937, that you left the employ of the Electrical Products Company in Portland, in February, 1937?

Mr. White: May I have that question, please?

(The question was read.)

The Witness: I didn't leave the employ of the Electrical Products Company at that time. I was transferred.

Q. By Mr. Lewis Lyon: In Portland, I said. [1220]

A. Oh, excuse me. That's correct.

The Court: You were transferred from where to where?

The Witness: From Portland to Omaha.

The Court: To Omaha.

Q. By Mr. Lewis Lyon: How long after you got to Omaha did you remain in the employ of the Electrical Products Corporation?

A. Not very long.

Q. It was a matter of about two weeks, wasn't it?

A. Correct.

(Testimony of W. C. Hulse)

Q. Mr. Hulse, after this so-called insulated wall was put around the cold diffuser in the chill room of the Yamhill plant, was there any way that you could get inside of the space that was occupied by the diffuser system?

A. Yes, sir.

Q. How? A. Through removable openings.

Q. They were big enough to get inside?

A. I don't recall that they were that big.

Q. How big were they?

A. Well, there was one big enough so that we could look through the inspection plant. There was another one big enough to get into, or partly into, to service the expansion valve and the equipment on that end of the unit.

Q. Now, while you were endeavoring to defrost this unit [1221] in carrying on this method of inspection, then, and looking to see how the thing operated, you had these doors open in the chill room, did you?

A. Normally, no, it wasn't necessary.

Q. You have testified that in order to find out how this thing was working you kept a visual observation, of watching the frost fall off. To do that you had to have the doors open, didn't you?

A. That's correct, when we first started; until we learned the time of defrosting, how long it took, why, we had to look.

Q. Do you know whether Electrical Products Company has ever made any other installation of a system of water defrost? A. I am not sure of that.

Q. Electrical Products Corporation was the agent for the Carrier Corporation at that time, was it not?

A. That's correct.

(Testimony of W. C. Hulse)

Q. Do you know whether they ever made any report of the operation of this system to the Carrier Corporation?

A. I wouldn't know for sure if a regular formal report was, although I do know that members of the Carrier field organization knew about it.

Q. You are acquainted with Mr. Niel Dahl, are you not?

A. That's right.

Q. He was your immediate superior, was he not, while you [1222] were connected with the Electrical Products Corporation?

A. Yes, sir.

Q. If any report was made, formal report was made, to the Carrier Corporation, he would have made it, wouldn't he?

A. That would be dependent upon whether it was made on our own volition, or whether it was requested by the Carrier Corporation.

Q. You know of no request from the Carrier Corporation, do you?

A. No.

Q. Isn't it a fact, Mr. Hulse, that the Electrical Products Corporation was responsible for this system, and in the end, to meet their responsibility, took out the water defrost and put in the hot air system?

Mr. White: I submit that that question is indefinite—

The Court: Overruled.

Mr. White: —that they were responsible for it.

The Witness: Well, I don't quite understand your point in the question.

The Court: By the way, is this contract in evidence?

Mr. Neave: It hasn't been offered, no, your Honor.

The Court: It hasn't been offered?

Mr. Neave: No.

(Testimony of W. C. Hulse)

The Court: Were you intending to offer it?

Mr. Neave: I was not intending to offer it, because we [1223] cannot prove where it has been before the time Mr. Hulse got it. He got it from the files of the company, and we have no proof of officers of the company.

The Court: Have you ascertained whether or not he is able to identify it as being a true copy?

Mr. Neave: I can and will. We will ask him to do that, and then I shall offer it.

Mr. Lewis Lyon: I have no objection.

The Court: To offering it?

Mr. Lewis Lyon: It isn't offered yet.

The Court: Do you offer it?

Mr. Neave: We will offer it now if Mr. Hulse will identify it, identify the signature.

The Witness: What is the number?

The Court: It is a typewritten signature.

Mr. Neave: No, I believe not, your Honor, not the one I am referring to.

The Court: Y-1?

Mr. Neave: Y-3 is the one I am referring to.

The Court: This is Y-1, a letter to Trullinger.

The Witness: That is not a contract. That is a proposal, a sales proposal.

The Court: A proposal, all right. Are you able to identify that proposal?

The Witness: Although it is not signed with my signature, [1224] these writings up here (indicating) on the original are my own.

The Court: Well, do you recognize that?

The Witness. Yes.

(Testimony of W. C. Hulse)

The Court: As the text of a letter which you dictated on or about that date to Fred L. Trullinger, and signed?

The Witness: Yes, sir.

The Court: And sent?

The Witness: Yes, sir.

The Court: Do you now offer it?

Mr. Neave: Yes, I offer Exhibit Y-1.

The Court: All right. Do you have any objection?

Mr. Lewis Lyon: No objection.

The Court: Y-1 is admitted. [1225]

[Note: Plaintiff's Exhibit No. Y-1 will be found in the Book of Exhibits at page 1215.]

The Court: Y-2 is admitted, is it?

Mr. Neave: Y-2 has not been offered.

Is Y-2 in your handwriting, Mr. Hulse?

The Witness: Yes.

Mr. Neave: Then I will offer that too, your Honor.

The Court: Is there any objection to Y-2?

Mr. Lewis Lyon: No objection.

The Court: Admitted.

(The document referred to was received in evidence and marked Plaintiff's Exhibit Y-2.)

[Note: Plaintiff's Exhibit No. Y-2 will be found in the Book of Exhibits at page 1219.]

The Court: Y-3 is the contract?

Mr. Neave: Did you sign that, Mr. Hulse?

The Witness: No. This Y-2—

The Court: No, Y-3.

The Witness: I signed that.

(Testimony of W. C. Hulse)

Mr. Neave: I offer that, your Honor.

The Court: Any objection?

Mr. Lewis Lyon: No objection.

(The document referred to was received in evidence and marked Plaintiff's Exhibit Y-3.)

[Note: Plaintiff's Exhibit No. Y-3 will be found in the Book of Exhibits at page 1220.]

The Court: Y-1, 2 and 3 are now admitted.

Mr. Neave: I would like to get this straight, your Honor.

Mr. Hulse, is Y-2 in your handwriting?

The Witness: No. [1226]

Mr. Neave: That is not in your handwriting?

The Witness: No.

Mr. Neave: Very well.

The Court: Well, it is admitted anyhow. I do not know what it is, apparently some inter-office communication.

The Witness: It is the copy that is necessary before any ordering of materials can be done by the order department.

The Court: Let me ask the witness a question. Y-3 in typewriting says "equipment as per attached proposal."

The Witness: Yes, sir.

The Court: Did that refer to Y-1?

The Witness: Yes, sir.

The Court: So that Y-1 was a part of Y-3?

The Witness: Yes, sir.

The Court: Excuse the interruption, counsel.

(Testimony of W. C. Hulse)

Mr. Lewis Lyon: I believe there was a question before the witness that remains unanswered.

The Court: The general question was as to whether or not you didn't know it to be a fact that the Electrical Products, Consolidated, pursuant to its responsibility, ultimately took out the water defrost system and installed the hot air defrosting system.

The Witness: I don't know that to be true.

By Mr. Lewis Lyon:

Q. You were not connected with the Electrical Products [1227] Corporation in any way after approximately the 1st of March 1937, is that correct?

A. That is right.

The Court: When you went there in October 1937 had the refrigerating unit which was on the floor been moved into the locker room yet?

The Witness: No, it was in the same position as the last time I had seen it.

The Court: Did you ever see it in the locker room?

The Witness: In 1945; yes.

The Court: In 1945?

The Witness: But not up until that time.

The Court: Very well.

By Mr. Lewis Lyon:

Q. Isn't it a fact, Mr. Hulse, that the occasion of your repeated visits to this plant daily as you have stated was because of the complaints of the operators and you had to try to make the system work?

A. No. We made several visits out there with other customers to show them how this job was done.

(Testimony of W. C. Hulse)

Q. But other than those you didn't take the customers out there daily, and the other times you went out daily, as you testified, was because of the complaints of the operators?

A. I didn't testify that I had been there every day. I said every few days. [1228]

Q. All right. Every few days then.

A. No, because that wouldn't be directly my part of the job. It is true that I have helped them. We find in a lot of those cases that a butcher is not a refrigerator man, he is a little hard to show how to operate any piece of mechanism, and they take a little teaching.

Q. But you say it is not a fact that the service charges that Electrical Products had to bear in connection with this job made it necessary for them to discontinue the operation of this system?

A. Of course I can't testify for the time after I left, but that would not be true up to the time I left Electrical Products.

Q. You know that there were several calls continuously from the Yanhill job while you were there still, do you not?

A. I wouldn't say continuously.

Q. Well, they were closely spaced, even if intermittently, isn't that correct?

A. We serviced the rest of the equipment in that place too.

Q. But you serviced particularly this cold diffuser unit and this so-called system of defrosting, didn't you?

A. Not excessively?

The Court: Did you get calls to come out and service it, complaints from the customers? Did you or didn't you? [1229]

(Testimony of W. C. Hulse)

The Witness: Not more than normal, about four or five calls.

The Court: Whether normal or not normal, did you get them?

The Witness: Four or five calls; yes.

The Court: All right.

Did you ever put in—I think you answered that—did you ever put any in after the Recold came on the market?

The Witness: I had no occasion because I was over in the air conditioning business then which is an entirely different setup, air conditioning and fixtures.

The Court: Air conditioning?

The Witness: That is right.

By Mr. Lewis Lyon:

Q. It is a fact, isn't it, Mr. Hulse, that to your knowledge no other installation like the Yamhill installation was ever made; isn't that true?

A. To my knowelge, yes.

The Court: Did you ever have or see a thermometer in the chamber, insulated chamber, where the cooling unit was at any time? Did you ever have or see a thermometer there.

A. No.

The Court: Did you ever take any means for measuring the temperature in that room, the insulated chamber, after it was insulated during the time of defrosting it by the water [1230] system?

The Witness: The only means of ascertaining the temperature was continually ice where we spilled it on the floor so it was below freezing.

The Court: The ice froze in the chamber?

The Witness: In the chamber on the floor; yes.

(Testimony of W. C. Hulse)

By Mr. Lewis Lyon:

Q. During defrosting?

A. No. It would freeze there any time that there was water. Yes, it would be during defrosting because that was the only time there was any water to freeze.

The Court: Then there was always ice on the floor?

The Witness: Underneath that machine.

The Court: All the time?

The Witness: That is right.

The Court: Well, now, let us go back to the question. Did you ever use any means to determine the temperature of the air in that chamber during the time of defrosting by water?

The Witness: I don't understand what you mean by "any means."

The Court: Maybe some of these inventors or experts may pull something out of their sleeve to ascertain temperature besides a thermometer.

The Witness: We have had our hands in there. There was [1231] always ice. That is some measure, if you want to be technical. The fact that the top of it was always open to the locker room temperature made it unnecessary for us to ever actually inquire because it was really a part of the locker room inasmuch as the two rooms were not closed off by a door.

The Court: You mean inasmuch as there were openings between the two rooms?

The Witness: That is right.

The Court: But you shut the fan off?

The Witness: That is correct.

Mr. Lewis Lyon: You shut the one opening—

(Testimony of W. C. Hulse)

The Court: And you shut the opening?

The Witness: We shut the bottom opening?

By Mr. Lewis Lyon:

Q. The intake fan?

A. That is right, but the cold air always goes down, you know.

The Court: Did you have the fan to suck the air in there or just one fan to blow it out?

The Witness: There was a fan on a single shaft. There are two fans on one shaft, that brought the air in through the bottom and normally would discharge out through the top.

The Court: That is, it sucked the air up around the fins and blew it out, is that right?

The Witness: That is correct. [1232]

The Court: From the cold room?

The Witness: That is right.

The Court: And you shut that bottom one and turned the fan off?

The Witness: That is right.

The Court: Did you ever turn that unit off to see how long it would take to defrost without any artificial means of defrosting either the hot gas, hot air, hot water or cold water or anything else?

The Witness: No, because we know from our own experience just everyday experience that that would take hours and hours and hours. We used to do the defrosting—I think I see the point you have in mind—we did the defrosting—

The Court: Don't think about the points I have in mind. You just answer the questions. We would get

(Testimony of W. C. Hulse)

along a lot further with your testimony if you wouldn't try to out-figure counsel and the court.

The Witness: All right.

The Court: You never did? The answer is, you never did?

The Witness: I never did.

By Mr. Lewis Lyon:

Q. Isn't it a fact, Mr. Hulse, that with the water sprinkling through the air with the bottom air intake closed that the warm water would cause the temperature of the air [1233] within that insulated space to rise?

A. Very slightly.

Q. It would rise? A. That is right.

Q. And hot air goes up? A. That is right.

Q. So that as the air raised in temperature it would go out the upper outlet, isn't that true?

A. That is pretty true; yes, sir.

The Court: Did you ever construct any other refrigeration unit where the requirement was for a below freezing point where you put the unit in an insulated room by itself?

The Witness: Yes.

The Court: Where? Several?

The Witness: Several; yes.

The Court: Is that the usual, or was it at one time the usual, course of business?

The Witness: Yes.

The Court: And for what reason?

The Witness: There are certain applications of the blower unit where all you want is a discharge of air. Take in car pre-cooling, the air there goes to a car, not to a room. It is sucked through coils in a separate insulated chamber by themselves.

(Testimony of W. C. Hulse)

The same thing could be said of the— [1234]

The Court: I am thinking of a stationary object.

The Witness: Yes, I mean stationary.

The Court: A car pre-cooling system wouldn't be a stationary object.

The Witness: The plant is stationary. You slide the cars up along the track, you hook the duct into the top of the car, blow the air into the car, cool it off, and then load your fruit or maybe it was partly loaded with fruit before.

We do the same thing, we insulate bunker coils, as we call them, and we hang them to the ceiling or put them in the floor, and put an insulated room around them and blow through them.

That is where we realized the trick of this water defrosting because we used to defrost those with a fire hose.

By Mr. Lewis Lyon:

Q. As an actual fact, Mr. Hulse, on the operation of this Yamhill job even when you had this installation installed, as you have testified, it was necessary to get in there many times with a fire water hose and try to supplement the water, isn't that so? A. That is not true.

Q. You never did that? A. I never did that.

Q. You never saw anybody else do that? [1235]

A. No, sir.

Q. You never knew of it being done? A. No.

Q. You never knew of the job freezing up at any time either or of anyone having to get in there with a torch to melt the ice out?

A. Well, they couldn't get into it.

Q. They couldn't get into it?

A. There is a hand hole about that big. (Indicating.)

(Testimony of W. C. Hulse)

Q. Now this hand hole is this big. (Indicating.) Before you couldn't tell me how big it was.

A. Before you were asking about the hole in the insulated wall. I am talking now about the hole in the case of the Carrier cold diffuser.

Q. And that hole in the case is the only thing you had to see through as to what was going on on the inside of the unit? A. That is correct.

Q. And that hole was about how big?

A. About that big. That is quite adequate. (Indicating).

Q. How far was that hole from the insulated wall?

The Court: Do you think the Circuit Court of Appeals would know how big he said that hole was?

Mr. Lewis Lyon: I think you are right, your Honor. [1236]

Q. That hole was a hole, as you have figured with your fingers, about 5 inches in diameter, isn't that about correct?

A. About that; yes.

Q. How far was that hole in the case from the insulated wall? A. Right adjacent.

Q. Right adjacent? Right up against it?

A. About an inch or two away probably.

Q. How thick was the insulated wall?

A. I would say two or three inches.

Q. Two or three inches thick? A. Yes.

Q. And in what position was the insulated wall with respect to the ends of this diffuser unit?

A. They covered one end, went down the back side, the side that had the inspection plate on it.

(Testimony of W. C. Hulse)

Q. Where was this hole with respect to the ends of the unit? A. It is right in the middle.

Q. How long was the unit?

A. I believe three feet.

Q. It is only three feet long? A. That is correct.

Q. It is not a 5-foot unit?

A. No, overall, but the coil area is about three feet. [1237]

Q. There is only three feet of coil area inside of that unit? A. Yes.

The Court: The overall length was five feet?

The Witness: Something like that.

The Court: Where are these doors that you could get in there by that you testified about a while ago?

The Witness: (Pointing at picture)

The Court: I know that, but you said there were doors and openings in the insulated wall where a person could climb in.

The Witness: Can we refer to a drawing to make this clear?

The Court: No, not now. Is that drawing in evidence?

Mr. Neave: It certainly is.

The Court: Is that the one you want to refer to?

The Witness: Yes.

The Court: Then you can refer to it.

Mr. Neave: It is Y-28.

The Court: I see where it is. You have marked it 1-A, access door?

The Witness: That is right.

The Court: The one on the end?

(Testimony of W. C. Hulse)

The Witness: Yes.

The Court: All right. Now how far was the wall of this [1238] insulated unit to the end from the end of the metal unit?

The Witness: Well, there is a motor drive on there, that is six, eight inches.

The Court: Well, maybe counsel can straighten it out on redirect. I cannot understand how a man could get in there.

The Witness: I understood the question to be about this door that is in the long way of the cold diffuser. Have we changed the question?

The Court: No, no. The question hasn't been changed. Some time ago you testified that there were doors by which a person could get in there.

Mr. Neave: That wasn't my recollection, that he said a person could get in there. Mr. Lyon said that.

The Witness: I said you could reach in there. I didn't say you could get in there.

The Court: The record will show what it shows.

By Mr. Lewis Lyon:

Q. Referring to Exhibits Y-17 and Y-18, is it your testimony now, Mr. Hulse, that the overall length of that casing is 5 feet, is that correct?

A. I believe I said approximately 5 feet. I don't know the exact dimension of it.

Q. What is your best recollection?

A. I still believe that is about right.

(Testimony of W. C. Hulse)

Q. All right. Now the coils that were inside of [1239] there, the coils through which the refrigeration passed are only 3 feet in length, that is your testimony, isn't it?

A. That is correct.

Q. Now how were those coils supported inside of that casing?

A. The coils are built as a single unit and bolted so that they can be removed through the top half of that section.

Q. Bolted to what? A. To the casing.

Q. To what part of the casing?

A. To the supporting section of the coil housing.

Q. That is the angle irons which make up the edges of the housing, isn't it?

A. I don't believe in that model that they used angle irons. I think that is just a roll case of heavy metal.

Q. And they were supported directly from the end sections, were they not? A. That is correct.

Q. It is your testimony now then that they were supported by hangers that were one foot long from each end section, is that correct?

A. You are confusing the point. I didn't say that.

Q. You say the casing is 5 feet long and the coils are 3 feet long?

A. I meant, and I understood the question to be, that [1240] the length of the entire unit overall, the entire unit, is 5 feet, and that would include the liquid, the suction header on one end, the fan motor and guard on the other end.

Q. I asked you how long the casing was, and you said 5 feet, didn't you? A. I didn't quite understand you.

The Court: How long is the casing?

The Witness: Three feet.

(Testimony of W. C. Hulse)

By Mr. Lewis Lyon:

Q. The casing is only 3 feet? A. That is right.

Q. And the coils that went inside of it are 3 feet?

A. As close as can be.

Q. How deep are the coil sections? There are three sections of this unit, a top, center and bottom section. What is the height of each one of those sections, showing the witness Y-17?

A. I wouldn't know exactly. I would say 15, 18, 20 inches.

Q. Which is your best recollection?

A. About 18 inches.

Mr. Lewis Lyon: That is all.

The Court: Redirect? [1241] .

Redirect Examination

By Mr. White:

Q. Mr. Hulse, when did you first see the floor diffuser unit defrosted after the locker room was first put in use?

Mr. Lewis Lyon: That is objected to as not redirect examination, your Honor.

The Court: Overruled.

The Witness: Will you repeat the question?

(The question referred to was read by the reporter, as follows:

“Q. Mr. Hulse, when did you first see the floor diffuser unit defrosted after the locker room was first put in use?”)

The Witness: I believe it was on November 10th.

(Testimony of W. C. Hulse)

By Mr. White:

Q. What kind of method of defrosting was used?

A. Water.

Q. Now when this floor diffuser unit was in operation, what was the temperature of the coils?

Mr. Lewis Lyon: That is objected to as not redirect examination, your Honor.

The Court: Let me hear the question again.

(The question referred to was read by the reporter, as follows:

“Q. Now when this floor diffuser unit was in operation, what was the temperature of the coils?”) [1242]

Mr. Lewis Lyon: There has been no testimony either on direct or cross about the temperature of the coils.

The Court: I think that is correct. I do not believe there was. Objection sustained.

Mr. White: That is all.

Mr. Lewis Lyon: That is all.

The Court: I want to ask one question. When you defrosted by water you turned the machine off so that the cooling material wasn't going through?

The Witness: Not always. There are two things—

The Court: You shut off the machine?

The Witness: We turned off the expansion valve so that no more liquid could go in. We didn't necessarily turn the machine in itself off. The machine would eventually go off by itself whenever it came down to the low pressure cut-off.

(Testimony of W. C. Hulse)

The Court: You mean it was an automatic machine anyhow?

The Witness: That is right. The ice machine in itself was set so that when the pressure within the coils gets down so low that it starts pulling down into a low vacuum, the machine will stop itself, so we didn't actually have to go and press a button to do that.

The Court: All right. That is all.

(Witness excused.) [1243]

The Court: This witness may be excused.

Mr. Neave: Mr. Dalin.

AXEL JULIUS DALIN,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: State your name, please.

The Witness: My full name is Axel Julius Dalin.

The Clerk: And your address?

The Witness: 2795 West Eighth Street, Los Angeles.

The Clerk: Take the stand.

The Court: If you are starting a new witness, we will have a recess for a few minutes.

(A short recess was taken.)

The Court: Did the other witness leave?

Mr. Neave: Yes, your Honor. Is there something else you wanted to ask him?

The Court: What man that has practiced law didn't think the next morning about just one more question?

(Testimony of Axel Julius Dalin)

Mr. Neave: That is true.

The Court: No.

Mr. Neave: I am afraid he has gone back to San Francisco. He was going to take a plane this afternoon. I can call him up if it is something you wanted, and perhaps counsel will stipulate. [1244]

The Court: I don't know, but the question was in my mind as to how come originally they didn't put the refrigerating unit in the locker room when they built it. That is where it is now.

Mr. Neave: I can answer that, your Honor, but it is not in the record.

The Court: I recall that he testified, or somebody did, it is in the record, that they used a warehouse that had been a dry storage warehouse for a locker room, but there isn't anything in the record as to why it was thus designed.

Mr. Neave: I don't believe so.

The Court: That is, to have the refrigerating unit out of the locker room.

Mr. Neave: I don't believe there is anything in the record about that.

The Court: I don't know whether he would know or not.

Mr. Lewis Lyon: I don't either.

Mr. Neave: Mr. O'Hearn says he thinks there is something in Postlewaite's testimony, and we will look it up and advise your Honor.

The Court: Postlewaite?

Mr. Neave: He was the man who was with the company that sold the job. He and Hulse belonged to the same organization. His direct testimony was not fully read this morning but only a portion of it. [1245]

(Testimony of Axel Julius Dalin)

The Court: Yes, I remember that. All right.

Mr. Neave: Apparently, on page 212 of the deposition he said that the unit was placed outside the locker room in order that lockers would not be misaligned:

"Q158." —this is cross examination—At the time that you stated you located this equipment at this Yamhill plant what was your reason for locating the diffuser outside of the cold room or outside of the locker room?

"A. Why we located it outside of the locker room? The row of lockers that would fit would be misaligned if the cold diffuser were put in the locker room, and at the request of Mr. Trullinger, that he would rather have that for the lockers, why, we looked for a space to put it. For a while we thought we would put it outside the room, the cold storage room, entirely; but we finally decided to sacrifice part of the chill room and put the cold diffuser in there as being more centrally located with respect to the locker room."

Apparently, they wanted more locker space.

Mr. Lewis Lyon: That hardly answers the question. If you look at the cross examination on the question of misalignment, when they did put it back in there, it did not misalign the lockers, and I could not find a vacant space [1246] where there were any lockers at any time.

The Court: Well, you can argue about that.

The question that was in my mind, for the benefit of counsel, was whether or not it had any relationship to keeping the temperature up in the locker room during the

(Testimony of Axel Julius Dalin)

necessary time that it would have to be defrosted, which appears to be what this argument is about.

Mr. Neave: I think that can be answered from the record that we have, your Honor, from the testimony of the deponents, and of Mr. Hulse.

The Court: All right. We will get to that, I suppose.

Mr. Neave: Shall I proceed, your Honor.

The Court: Yes.

Q. By Mr. Neave: Mr. Dalin, I am quite a distance from you, and I will try to keep my voice up, and you please try to do the same, or else I won't hear you.

A. All right.

The Court: Do you have any difficulty in hearing?

The Witness: No.

Q. By Mr. Neave: What is your position, Mr. Dalin?

A. My position is district chief engineer.

Q. For what company?

A. For the York Corporation in Los Angeles.

Q. How long have you held that position?

A. Since July, 1933. [1247]

Q. Where were you born?

A. I was born in Gutenberg, in Sweden.

Q. Where did you get your education?

A. In Sweden.

Q. You had an engineering education in Sweden?

A. Yes.

Q. Now, do you know a Mr. Walling?

A. Yes.

Q. He testified in this case that from 1938 to 1941, he was the manager of the commercial department of the

(Testimony of Axel Julius Dalin)

York Corporation at Los Angeles. What is the commercial department?

A. Well, the commercial department in refrigeration is classified as smaller compressor units, up to and including 10 horse-power.

Q. What department has the units above 10 horse-power?

A. That is classified as industrial refrigeration.

Q. Was Mr. Walling during the period mentioned ever the manager of the industrial department?

A. No.

Q. Now, you say this is a district office of the York Corporation. What states does the district office cover?

A. It covers the State of California, Nevada, Arizona, and also Sonora and Sinaloa Counties, and the lower California in Old Mexico. [1248]

Q. Was Mr. Walling the manager of the commercial department in all of these states or districts?

A. No, only the city and county of Los Angeles, and also Ventura and Orange Counties.

Q. Did you hear Mr. Tuttle testify in this case?

A. Yes.

Q. What was the date when Mr. Tuttle's employment was terminated with the York Corporation?

A. Our records show that he was terminated September 15, 1939.

Q. Mr. Tuttle has testified that in a conversation with you around 1938 or '39 you stated to him that water defrosting was an exploded idea and that York had thrown it out years ago. Did you ever make such a statement?

A. I cannot recall such a statement.

(Testimony of Axel Julius Dalin)

Q. Do you believe that you would recall it if you had made it? A. No.

Q. You don't think you would remember making the statement if you had made it?

A. No, I don't see why I should because, to my knowledge, York never tried out water defrosting at that time.

Q. You mean you don't see why you should have made the statement? A. That's right. [1249]

Q. Did Mr. Tuttle ever tell you or did you ever tell Mr. Tuttle that, in your opinion, water defrosting wouldn't work? A. Not to my knowledge.

The Court: You mean, not to your recollection?

The Witness: That is correct, your Honor.

Mr. Neave: I would like to have a paper addressed to Refrigeration Engineering, Inc., and dated 8-25-39 marked as Plaintiff's Exhibit 103, for identification.

(The document referred to was marked Plaintiff's Exhibit No. 103, for identification.)

Q. By Mr. Neave: I show you Plaintiff's Exhibit No. 103, for identification, Mr. Dalin, and ask you whether you can identify it. A. Yes, I can.

Q. What is it?

The Court: Is this the original?

Mr. Neave: That is a copy.

The Court: Do you have the original?

The Witness: No, I have not.

The Court: Oh, it is a photostat?

Mr. Neave: It is a photostatic copy.

The Court: Very well.

The Witness: It is a copy of York's purchase order No. 27646 to Refrigeration Engineering, Inc. in Los An-

(Testimony of Axel Julius Dalin)

geles for [1250] one Recold No. 40LT unit, 110 volts, 60 cycles.

Q. By Mr. Neave: Is that an order placed by the York Corporation? A. That is correct.

Q. Was it placed with your approval?

A. Yes, it was.

Q. And was it placed on 8-25-39?

A. That is the date of the order.

Q. Prior to that date had you ever seen a Recold unit with water defrosting in operation? A. No.

Mr. Neave: That is all.

The Court: Cross-examine.

Cross Examination

By Mr. Lewis Lyon:

Q. Prior to the date of this order, Mr. Dalin, prior to August 25, 1939, had you ever discussed with Mr. Tuttle, Mr. Walling, or any one else in the York organization in Los Angeles the Recold water defrost unit?

A. I recall I had discussion with Mr. Walling.

Q. With any one else?

A. No, not as I recall it at this time, no.

Q. How far before August 25, 1939, did this conversation with Mr. Walling take place?

A. I cannot exactly say, but only probably a few weeks before the placing of this order. [1251]

Q. And at that time you discussed with Mr. Walling, did you not, the Recold water defrosting proposition?

A. Not as I recall.

(Testimony of Axel Julius Dalin)

Q. You didn't discuss the Recold system at all with Mr. Walling prior to August 25 of 1939?

A. Yes, I told you I recall shortly before that I discussed that we should try out the Recold unit in a low temperature installation.

Q. Who is Mr. E. E. Collins?

A. E. E. Collins worked directly under me at that time. He is an engineer, a graduate engineer.

Q. Where is Mr. Collins at the present time?

A. He is working for the Safeway Stores, Inc., in San Francisco.

Q. Does this order which you have here produced, dated August 25, 1939, then show your first experience with the system of water defrosting?

A. As I recall it, yes.

Mr. Lewis Lyon: That is all.

Redirect Examination

By Mr. Neave:

Q. Did you get any guarantee from the Recold Company when they sold this unit to you? A. No.

Mr. Lewis Lyon: That is not redirect. [1252]

Mr. Neave: I recalled the witness for the purpose of that question, your Honor.

The Court: All right.

Mr. Neave: That is all.

The Court: Is that all?

Mr. Lewis Lyon: Just one question.

(Testimony of Axel Julius Dalin)

Recross Examination

By Mr. Lewis Lyon:

Q. Isn't it a fact, Mr. Dalin, that prior to this date of August 25, 1939, that you visited the installation of the Johnston Pie Company in Los Angeles?

A. No.

Q. You had never been there?

A. No, I have not been there.

The Court: You never have?

The Witness: Where is that?

By Mr. Lewis Lyon:

Q. Johnston Pie Company in Los Angeles.

A. Johnston?

Q. Yes. A. I don't recall the name.

Q. You have never been there at any time that you know of? A. I don't recall it.

Q. A commercial pie manufacturer? [1253]

A. No. The only pie manufacturing—

Q. Between San Pedro and Central Avenue on 41st Street?

A. The Bowie is the only pie installation I have seen in Los Angeles; B-o-w-i-e.

Q. You never saw nor, as far as you know, none of your engineers, Mr. Collins or anyone else, has ever visited that installation before you placed this order?

A. I don't recall.

Q. Didn't Mr. Walling report to you that he had been to that Johnston Pie job in this conversation with you?

A. I do not remember.

(Testimony of Axel Julius Dalin)

Q. Didn't Mr. Tuttle report to you that fact?

A. At that time Mr. Tuttle was an order clerk in our organization and he had nothing to do with any installations of any kind.

The Court: Did he report to you that he did?

The Witness: No, I cannot recall, your Honor.

By Mr. Lewis Lyon:

Q. You can't recall his reporting the fact that he had been out and saw the Johnston Pie Company job in operation?

A. I cannot remember.

Q. Is it your testimony that before August 25, 1939 that as far as you know no engineer or party associated with you in the York office at Los Angeles had ever seen a Recold unit in actual operation? [1254]

A. I cannot say that he did. I had not seen any myself.

Q. You can't say that you hadn't either?

A. I had not seen one.

Q. Were you instrumental in instituting this order that Mr. Collins placed, or was that on his own volition and one that he presented to you and asked, "Is that all right"?

A. I approved of it.

Q. But you didn't institute it?

A. No.

Q. You didn't know anything about it until he presented to you and said, "Is this all right," is that correct?

A. Yes. I had read about it in the Recold catalogs.

Q. I say, about this particular order, the fact that York was ordering this particular device, you didn't know anything about it until Mr. Collins said, "Is this okay Mr. Dalin," isn't that correct?

A. That is not correct. He asked me if we should try out the water defrosting. I said yes.

(Testimony of Axel Julius Dalin)

Q. And that was before or after the order was placed by phone, do you know? A. That was before.

Mr. Lewis Lyon: That is all.

Mr. Neave: That is all.

(Witness excused.)

Mr. Neave: Mr. Chamberlain. [1255]

JOSEPH REDDINGTON CHAMBERLAIN

called as a witness by and in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Joseph Reddington Chamberlain.

The Clerk: Your address?

The Witness: R. D. No. 2, York, Pennsylvania.

Direct Examination

By Mr. Neave:

Q. By whom are you employed, Mr. Chamberlain?

A. York Corporation.

Q. What is your present position?

A. I am assistant chief engineer.

Q. How long have you held that position?

A. Since May 1945.

Q. How long have you been with the company?

A. Since June 25, 1928.

Q. What work did you do before you became assistant chief engineer?

A. I have been in the engineering department since I completed the student course in 1930.

(Testimony of Joseph Reddington Chamberlain)

From 1930 to 1932 I was classed as a junior engineer; from '32 to '35 as an associate engineer; from '35 to '38 as senior engineer; from '38 to '43 my title was assistant chief mechanical engineer; from '43 to '45, until my present position, I [1256] was chief mechanical engineer.

These duties involved from the outset a great deal of work in the field and in the office. The job of the mechanical engineering department, with whom I have been up until the present job and at which time I was at one time head of this department, they controlled the application of engineering practices of the corporation, involving field work that had to do with compressors, air conditioners and all types of refrigeration.

Q. Have you an engineering degree?

A. I have, sir.

Q. What is it?

A. I have a degree of bachelor of arts from Duke University in 1925, and a degree of electrical engineering from Cornell University in June 1928.

Q. Are you a member of any engineering societies?

A. I am a member of the ASRE, American Society of Refrigerating Engineer.

Q. Have you ever testified in a case before?

A. No, sir.

Q. Will you describe briefly what refrigerating equipment consists of?

A. Refrigerating equipment in its barest fundamentals consists of an evaporator—

The Court: This is a mechanical refrigerator? [1257]

The Witness: Yes.

The Court: The barest fundamental would be a cake of ice.

(Testimony of Joseph Reddington Chamberlain)

The Witness: I thought you were going to suggest an absorption refrigerator which I would have hated to get into right now. But mechanical refrigeration, your Honor, consists of an evaporator, a compressor, a condenser, the interconnecting piping, including one expansion valve.

By Mr. Neave:

Q. What is the function of the evaporator? [1258]

A. The function of the evaporator is to evaporate the refrigerant which is expanded through the expansion valve and in so evaporating this refrigerant absorbs heat from the product being cooled.

Q. What does the evaporator, what portion of a home ice-box is the evaporator?

A. The evaporator in a home ice-box is the thing which gets all frosted up and where we get the ice cubes from, where they freeze the ice.

Q. What is the function of the compressor?

A. The compressor removes the evaporated gas from the evaporator and raises the pressure of this gas to put it in position, you might say, of compressing it to a high enough pressure so that it may be condensed by the condensing medium, usually water or air.

Q. That takes place in the condenser?

A. That takes place in the condenser.

Q. What are the most common types of refrigerants?

The Court: Then the operation is that you condense it—

The Witness: Condense it in the condenser.

The Court: Then evaporate it and then condense it?

(Testimony of Joseph Reddington Chamberlain)

The Witness: It makes a closed cycle. I guess, your Honor, that you might say that we refrigerating engineers are conservation engineers. We could have a refrigerant without all this closed cycle, if you just expand the gas you [1259] refrigerate, but it costs money so the idea is to re-cycle it so that it can be used over and over again.

The Court: You expand the gas in the coils?

The Witness: We expand the gas, yes.

Q. By Mr. Neave: Can you tell us what are some of the refrigerants, and then I would like to know how the refrigerants act.

A. There are many refrigerants. Of course, anything that can be vaporized is essentially a refrigerant. The ones that are usually used for the production of cold, that is, colder than ordinarily thought of as atmospheric temperature, might be ammonia, methyl chloride, sulphur-dioxide, carbon-dioxide, and any variety of Freon refrigerants. They are known as primary refrigerants.

Then there are many types of brine, usually a solution of sodium or calcium chloride known as secondary refrigerants.

Q. How is this brine refrigerated?

A. Brine is ordinarily cooled in a so-called brine cooler. A brine cooler consists usually—that is, at the present time, at least—of a so-called shell and tube evaporator. It consists of a shell with tube sheets, fixed tube sheets, through which are passed tubes, and surrounding these tubes one finds the evaporating refrigerant and through the tubes passes the brine to be cooled.

There are other types of brine coolers, such as the so-called [1260] shell and coil type, and the double pipe type.

(Testimony of Joseph Reddington Chamberlain)

Q. These refrigerants that you have referred to are the primary refrigerants which you previously mentioned?

A. That is right.

Q. Now, how do these primary refrigerants act as refrigerants and absorb heat?

A. When you reduce the pressure on this vessel, such as the brine cooler I just mentioned, by means of sucking the gas away by means of the compressor, the reduction in pressure causes the refrigerant to boil by virtue of the refrigerant having absorbed heat from the product being cooled, and in the absorption of heat it evaporates and in evaporating it releases the so-called latent heat of evaporation and thus refrigerates the fluid, whichever it may be, air or some other type of fluid.

Q. And this change of state from the liquid to the vapor is the thing that absorbs the heat, is that right?

A. The evaporation of the fluid absorbs heat from the product being cooled.

Q. And where does this take place?

A. In the evaporator.

Q. And then as I understand it the compressor takes these gases away from the evaporator?

A. Exactly.

Q. And compresses them, and then the condenser turns [1261] them again into a liquid, is that right?

A. Yes, sir.

Q. Is there something called a receiver?

A. A receiver is sometimes used to serve as, you might call it, a surge tank.

Q. Surge? A. Surge tank.

We have two types of receivers, either high-pressure or low-pressure, but usually we talk of a receiver as a

(Testimony of Joseph Reddington Chamberlain)

high-pressure, and it may be a part of a condenser. But a receiver is, you might say, a swelling in the line really, a reservoir for liquid refrigerant which has been condensed in the condenser. It is used to take the surge of the refrigerant because of the change in load on the evaporator, the amount of load varying on account of the rate of boiling.

Q. What specific refrigerating equipment does York make?

A. York makes condensers, compressors, evaporators, and all parts of a refrigerating plant.

Q. Prior to September, 1937, what kind of refrigeration installations did it sell?

A. It sold both standard off-the-shelf products, and complete tailor-made refrigerating plants of all types.

Q. In these tailor-made plants that you are talking about, what was the nature, kind, of evaporator that was used?

A. Frequently it was pipe coils in the room, on the [1262] ceiling and around the walls of the room.

Q. They were bare pipes?

A. They were bare pipes, and sometime fin pipes. Also we sold units using a casing surrounding a compact coil through which air was either sucked or blown by means of a fan.

Q. These pipe installations that you put in, what kind of refrigerant was used in those pipes?

A. Well, we used brine, we used ammonia, and we used Freon.

The Court: What is Freon?

(Testimony of Joseph Reddington Chamberlain)

The Witness: Freon is a trade name, your Honor, for a refrigerant manufactured by the Connecticut Chemical Company, a DuPont subsidiary.

I mentioned a minute ago that there were a variety of freons. The one most generally referred to as Freon is Freon 12, which is used in commercial refrigeration quite extensively at this time.

Also it was the product used in the Airosol bombs that they used during the war to act as a carrier for insecticide.

Do you want the chemical name?

The Court: No.

It is a patented product?

The Witness: It is a patented product and the patented angle of the thing involves the use of fluorine in a chlorinated hydrocarbon. [1263]

The Court: It is a liquid?

The Witness: It is a liquid or gas, depending upon the pressure, sir.

The Court: I see.

Q. By Mr. Neave: Were such pipe installations as you installed prior to September, 1937, installations below freezing temperature? A. Yes, sir, many of them.

Q. Do you still install such installations?

A. Yes, we do. In fact, we are installing one right now in Los Angeles at the Delta Seafoods Company out on Washington Boulevard.

Q. What are the advantages of this type of installation?

A. No one type of installation is proper for all applications. Frequently this type of installation is used when it is necessary to freeze a product not properly

(Testimony of Joseph Reddington Chamberlain)

wrapped and sealed. In the case of the seafoods job that I just mentioned, it is suicide to try to freeze fish by wind blowing over it. It dehydrates the fish, and when you thaw it out it is just like rotten wood.

The Court: Is it edible?

The Witness: Your Honor, it is edible. It isn't poisonous, but it wouldn't be what you would term desirable. It wouldn't have the bloom that your wife wants when she buys a product.

The Court: When you say it is suicide, you mean it would [1264] be unsuccessful?

The Witness: I mean it would be unsuccessful as an installation from the standpoint of the customer.

The Court: Commercially unsuccessful.

The Witness: That is right.

The Court: Very well. [1265]

Mr. Neave: I would like to have a photograph marked as Plaintiff's Exhibit 104, for identification.

(The photograph referred to was marked as Plaintiff's Exhibit 104, for identification.)

Mr. Neave: I am not sure, your Honor, whether I offered 103 in evidence.

The Court: Yes, you offered it. I don't think I have ruled on it. It is admitted.

(The document referred to, heretofore marked as Plaintiff's Exhibit No. 103, was received in evidence.)

[Note: Plaintiff's Exhibit No. 103 will be found in the Book of Exhibits at page 1298.]

(Testimony of Joseph Reddington Chamberlain)

Mr. Neave: I would like to have a second photograph marked as Plaintiff's Exhibit 105.

(The photograph referred to was marked as Plaintiff's Exhibit 105, for identification.)

The Witness: Which are which here?

Mr. O'Hearn: That (indicating) is 104 and that is 105.

Q. By Mr. Neave: Mr. Chamberlain, would you look at Plaintiff's Exhibits 104 and 105 and state whether or not they are illustrative of the pipe coil installations to which you have referred?

A. They are, sir. 104 is a freezer in a locker plant. The other picture is of a holding freezer with ceiling coils where there is stored considerable fish in a frozen state.

Q. In Plaintiff's Exhibit 104 the coils of the same appear to serve as shelves for products. Is that a common [1266] use of it?

A. It is, sir. The purpose of the shelves is to provide contact directly with the refrigerant for more rapid freezing. If you try to freeze a product with air, you get some losses in the terms of the temperature differences necessary to first refrigerate the air and then refrigerate the product from the air, whereas by placing coils directly on to pipes the product can be refrigerated directly from the refrigerant, due to contact.

Mr. Neave: May I have the reporter read the last part of the answer?

(Testimony of Joseph Reddington Chamberlain)

(The portion of the answer referred to was read as follows):

“If you try to freeze a product with air, you get some losses in the terms of the temperature differences necessary to first refrigerate the air and then refrigerate the product from the air, whereas by placing coils”—

Q. By Mr. Neave: Just a minute. Did you mean to say “placing coils”?

A. Placing the product directly onto pipes. I am very sorry if I said “coils.”

Q. Now, were such installations defrosted?

A. Yes.

Q. How frequently were they defrosted?

Mr. Lewis Lyon: Your Honor, I don't believe there is [1267] any particular foundation laid for any such question. It is a general question.

The Court: Such installations,—I think that is a little too broad.

Mr. Neave: I am talking about the pipe, generally speaking, the pipe type of installation. I am not referring to the particular installations on Plaintiff's Exhibit 104 and 105, which are illustrative of his testimony.

The Court: All right.

Mr. Lewis Lyon: I think the question then is too general, because no foundation has been laid at all for any such question. It is too general to have any probative value whatsoever.

The Court: Overruled.

The Witness: May I have the question again, please?

(Testimony of Joseph Reddington Chamberlain)

(The question was read.)

A. Such installations are defrosted periodically depending upon a great many conditions, but generally not more than twice a year.

Q. By Mr. Neave: In installations of this character which York has made, what type of defrosting has been sold or recommended?

A. In these applications if the refrigerant were brine, ordinarily warm brine would be circulated through the coils for the purpose of loosening the frost or even melting it. [1268] In a case of direct expansion refrigerant, where the refrigerant is boiled right in the coil, then we usually defrost with hot gas, loosen it sufficiently so that it can be knocked off and then swept up out of the room.

Q. Was that method of defrosting used prior to 1937?

A. It was, sir.

Q. Is it used today? A. It is, sir.

Mr. Neave: I offer in evidence Plaintiff's Exhibits 104 and 105.

Mr. Lewis Lyon: I don't think that there is any materiality to the exhibits, your Honor.

The Court: They are illustrative of his general testimony. The objection is overruled.

(The documents referred to, heretofore marked as Plaintiff's Exhibits 104 and 105, for identification, were received in evidence.)

[Note: Plaintiff's Exhibits Nos. 104 and 105 will be found in the Book of Exhibits at pages 1299 and 1300.]

(Testimony of Joseph Reddington Chamberlain)

The Court: These are both brine refrigerants?

The Witness: No, sir, they are both direct expansion.

Q. By Mr. Neave: What does that mean?

A. It means that the refrigerant is expanded into the coils and boils therein. There is no second refrigerant involved, in other words.

Q. It might be ammonia or Freon?

A. Ammonia. These are ammonia jobs. [1269]

Q. Now, you said that there was another type of refrigerating system other than the pipes. Now, what other type was sold by York prior to September, 1937?

A. What we call a unit air-conditioner, consisting of a nested pipe coil in a casing, through or over which air was blown by fan.

Q. Was the fan in the casing?

A. The fan was a part of the unit and in the casing.

Q. What refrigerants are used in such units?

A. Brine, Freon and ammonia.

Mr. Neave: I would like to have marked as Plaintiff's Exhibit 106 two sheets, one of which in the upper right-hand corner bears "Section 210-A, Page 63-B," and the other "Section 210-A, Page 64-B," dated May 20th, 1935.

The Clerk: Do you want the two sheets as one exhibit?

Mr. Neave: As one exhibit.

(The sheets referred to were marked as Plaintiff's Exhibit No. 106, for identification.)

Q. By Mr. Neave: Can you identify this Plaintiff's Exhibit 106? A. I can.

(Testimony of Joseph Reddington Chamberlain)

Q. What is it, please?

A. That is a page, the opposite sides to one page, from the York price book, dated May 20, 1935, showing the coil type air-conditioner which I just described; on page 63-B the [1270] F. B. 800 and F. B. 1400 unit, with suction trap and low pressure float connections, and in the lower left-hand corner the same conditioner with the front panel removed, showing the coils.

The other page bears the same date and shows a ceiling type unit of one, two and four-fan varieties. The nomenclature, if it means anything, it is the floor type bare coil, and 800 feet of pipe for the F. B. 800, and so on; and the ceiling type unit is the one-fan ceiling dry, "S" meaning I don't know what.

Q. Now, were units such as shown on Plaintiff's Exhibit 106 sold by York prior to September, 1937, for below freezing applications?

A. They were.

Q. Are similar units sold today for that purpose?

A. There were units earlier than these and there are units later than these, all having the same general design. However, there have been some structural changes, as indicated by change in design or standardization of the product.

Q. Looking at Plaintiff's Exhibit 106, page 63-B, what is the tank that is shown on the top of each of the units on that page?

A. That is, in general refrigeration parlance, a surge drum or suction trap. This particular application was for ammonia, and it was arranged for flooded operation. By [1271] "flooded" I mean the liquid was expanded into the drum, and by virtue of its elevation completely flooded

(Testimony of Joseph Reddington Chamberlain)

and wetted all the surface. On top—I mean connected in the drum is a flood valve which acted as the control. When that unit was used for brine, that is, brine circulation through the coils to act as a refrigerant, the surge drum was eliminated. It could be perfected or built with or without the surge drum.

Q. Looking at the lower left-hand unit on the same page, which has its front removed, what are the black cylindrical things above the pipes.

A. They are fans. There are three fans in that unit of the Sirocco type.

Q. Did you also sell a one-fan unit?

A. We sold a one-fan and a larger three-fan than shown here.

Q. Now, turning to the other page, 64-B, I observe that the lower two photographs of the ceiling unit do not have the tanks that are shown in the upper two photographs. Why is that?

A. They are arranged for brine, as is already noted on the sheet; with flanges only for brine.

Mr. Neave: I will offer this in evidence as Plaintiff's Exhibit 106.

The Court: Admitted. [1272]

(The sheets referred to, heretofore marked as Plaintiff's Exhibit No. 106, for identification, were received in evidence.)

[Note: Plaintiff's Exhibit No. 106 will be found in the Book of Exhibits at page 1301.]

(Testimony of Joseph Reddington Chamberlain)

Mr. Neave: I would like to have marked as Plaintiff's Exhibit 107 five sheets, and I must confess I have not got photostats of them.

Mr. Lewis Lyon: What sheets are they?

The Witness: I don't think they are in your book, Mr. Lyon.

Mr. Neave: I will get them for Mr. Lyon.

The Court: What is the purpose of that?

Mr. Neave: These show the general capacities of these units, your Honor.

The Court: The capacity?

Mr. Neave: In refrigeration; capabilities of refrigeration.

Mr. Lewis Lyon: I don't see the materiality of it, your Honor.

Mr. Neave: Perhaps we can get this done quickly by having it gone through.

Q. By Mr. Neave: Mr. Chamberlain, I show you Plaintiff's Exhibit 107, for identification, and ask you whether or not these sheets show the capacities of refrigeration of the various types of units illustrated in Plaintiff's Exhibit 106. [1273]

Mr. Lewis Lyon: In what regard?

The Court: In units of refrigeration?

Q. By Mr. Neave: Will you answer the question?

A. Those pages show the rating in tons of refrigeration at various temperatures of air entering the conditioner, which is the same as the room temperature, with various average brine temperatures through the coils or temperatures of the evaporating ammonia in the coils.

(Testimony of Joseph Reddington Chamberlain)

The Court: What do you mean by: "units in tons of refrigeration"? How can you have a ton of refrigeration?

The Witness: In refrigeration parlance, your Honor, back in the old days most refrigeration was thought of in ice melting capacity. Ice was the basic refrigerating medium before there was much mechanical refrigeration.

The Court: Tons of refrigeration are the equivalent of so many tons of ice?

The Witness: A ton of refrigeration is equivalent to melting one ton of ice from and at 32 degrees in 24 hours. That is the same as saying a ton of refrigeration is equivalent to 12,000 B.T.U.s per hour, or 200 B.T.U.s per minute heat absorption, or 288,000 B.T.U.s per 24 hours. That is the equivalent of melting one ton of ice, and it has nothing whatsoever to do with a ton of anything,—a ton of ice. The larger plants in refrigeration are rated in tons, because it is a more convenient figure to handle. Otherwise, it would [1284] get too big. The smaller units are rated in B.T.U. They say B.T.U., but actually they mean B.T.U.s per hour.

The Court: Then the ton of refrigeration is equivalent to the application of a certain quantity of B.T.U.s in 24 hours?

The Witness: That is right, and it refers to the melting of 2,000 pounds of ice in 24 hours. I say that because somebody might think it is a long ton.

The Court: Or a metric ton.

The Witness: That is right.

The Court: Or a Japanese ton.

(Testimony of Joseph Reddington Chamberlain)

Mr. Neave: I will offer Exhibit 107 in evidence.

Mr. Lewis Lyon: I still don't see the materiality of it, as to what the capacities of these machines are.

The Court: I don't, unless you are offering it as a scientific work.

Mr. Neave: I am offering it to show what at this date, which is 1935, these devices that are shown on Plaintiff's Exhibit 106 were capable of producing in the way of refrigeration.

I am now going to ask the witness:

Q. What temperatures were the units which were shown on the catalogue sheet, Plaintiff's Exhibit 106, capable of maintaining?

Mr. Lewis Lyon: That is absolutely immaterial, as to what [1275] they were capable of maintaining.

The Court: In the first place, coming to the second question before I go back to the other one, I think your objection would have to be that there isn't any foundation laid for that. In other words, it would have to be capable of maintaining in a given space or quantity of air, or something like that. And on the other one, I still can't see the materiality of it. Let me look at it.

Mr. Neave: The two are linked together, your Honor. 107 shows under what conditions what they are capable of maintaining. For instance, the left-hand column shows the temperature. If they have got to deliver 10 degrees to a room they will be able to deliver .8 tons of ice, is that fractional figure there, and I was going to ask the witness to explain that.

Mr. Lewis Lyon: What is the materiality, even if it is explained?

(Testimony of Joseph Reddington Chamberlain)

The Court: This says "F. B. 500 D." You haven't got any F. B. 500. You have got F. B. 800.

The Witness: F. B. 500 is the one-fan unit I spoke of in illustration, and the F. B. 800 and the F. B. 1400 are here. It is not illustrating the whole thing. That "D" means—"D-5" means 1935 in our nomenclature on that particular type of work.

The Court: Where is "D"—oh, "D-5"? [1276]

The Witness: Yes.

The Court: No. F. B. 800 D-5?

The Witness: That means floor type bare coil unit. The next number is the number of feet of three-quarter-inch pipe in there. The "D-5" means 1935. "D-6" would be 1936. "D" meaning A, B, C, D, which means—

Mr. Lewis Lyon: That would be 1945, wouldn't it? A, B, C, D?

The Witness: No, from 0 to 10 is "A." Savvy? [1277]

Mr. Lewis Lyon: A, B, C, D? D is the fourth letter.

The Witness: All right. We are in the fourth ten years of the century when we get there. From 0 to 10 would be A, then 10 to 20 would be B, 20 to 30 would be C and 30 to 40 would be D, as the fourth ten years.

Mr. Neave: No, the witness has testified that these units—

The Court: This may be material but if it is, I do not understand it.

Mr. Neave: Let me try to explain it to you.

The Court: I can understand more or less vaguely his very terse explanation of tons of refrigeration capacity.

Mr. Neave: Well, your Honor, here is the point that I am making. The witness has testified that these units were sold prior to 1937 for below freezing applications,

(Testimony of Joseph Reddington Chamberlain)

and now I am putting this in simply as a written corroboration of that testimony. These are capable of doing so.

Mr. Lewis Lyon: I don't see that it has any materiality.

The Court: The capacity and tons of refrigeration—here is F. B. 1400 D-5. The first column is the temperature, down to 34, between 34 and 36, and there is a red line drawn all the way across, and it says "Defrosting Arrangements must be provided in this zone."

Mr. Neave: That is the below freezing zone.

The Court: Well, it takes a jog over here some place. [1278] It says 40 pounds, 25.8 Fahrenheit.

The Witness: That is the temperature corresponding to the ammonia pressure at 40 pounds pressure.

The Court: It is the temperature of what?

The Witness: Of the ammonia.

The Court: Of the ammonia.

The Witness: Yes, and the other figure is the pressure of the ammonia at that same evaporating temperature.

The Court: And the temperature of the air entering the air-conditioner—what is that right under the 40 pounds, 25-8 Fahrenheit?

The Witness: That is the temperature of the ammonia which will exist.

The Court: But then what is this 1.1?

The Witness: That is the tons that it will produce if you come right straight across to find the entering air temperature.

The Court: Those are the tons?

The Witness: Yes, sir.

(Testimony of Joseph Reddington Chamberlain)

The Court: I see. In other words, if the temperature of the air entering the conditioner, that is, just atmospheric temperature, general air, any kind of air.

The Witness: That is any kind of air taken out of a refrigerated room. That is the room temperature. Entering air is the temperature of the air entering the conditioner. [1279]

The Court: I thought that is what came out of the conditioner.

The Witness: No, sir. It comes out of the conditioner colder than that. Obviously we have to have heat pick-up in order to refrigerate so that you bring air back at the temperature you hold, say 10 degrees or 20 degrees, or what have you, and the air going into the space is colder by certain air range that can be calculated from that tons and the cubic feet of air handled as listed in the table up at the top.

The Court: Well, then there is another little note in red ink here, "Temperature of air entering conditioner, 80 degrees."

The Witness: Yes, sir.

The Court: And then right across there you don't have anything to denominate tons of refrigeration. It says "Select conditioner size for maximum of 18-hour operation per day to provide for defrosting in this zone."

The Witness: If the temperature of the coils are cold enough so that the moisture condensed on the coils reaches a dew point below freezing, frost is formed. However, if you select the equipment large enough so that you will have some times when refrigeration can be stopped with the fans continuing in operation, the air being higher than freezing the air itself will defrost the unit so that no

(Testimony of Joseph Reddington Chamberlain)

defrosting device is [1280] necessary. That is what that line means?

The Court: In other words, with the 80-degree or 75-degree temperature here of air—

The Witness: If you get a frost it will melt itself off, providing you—

The Court: You shut the machine down?

The Witness: Just stop the refrigeration on the coil. That is all it means.

Mr. Neave: All I am trying to do, your Honor, is to show what the situation was prior to 1937, and I am going to go on from here.

The Court: I think it is a good idea to go on, but this will just be marked for identification.

Mr. Neave: Very well, sir.

The Court: No. 107, for identification.

(The document referred to was marked as Plaintiff's Exhibit No. 107, for identification.)

[Note: Plaintiff's Exhibit No. 107 will be found in the Book of Exhibits at page 1303.]

Mr. Neave: Q. Prior to September, 1937 how were units of the type shown in Exhibit 106 defrosted?

Mr. Lewis Lyon: That is objected to as too general a statement, your Honor. If it is an endeavor to prove any prior use or anything as to prior art, the question of how were a multitude of units defrosted under varying conditions is certainly not proper.

Mr. Neave: I will rephrase the question and ask the [1281] witness in these units as sold by the York Cor-

(Testimony of Joseph Reddington Chamberlain)

poration prior to September, 1937, what methods of defrosting were available with them.

Mr. Lewis Lyon: I still think that is too indefinite, your Honor, as to "these units."

The Court: Overruled. He has got four units shown here.

The Witness: Any of these units could be defrosted if they were above freezing in the manner just described to your Honor by picking them large enough.

The Court: You mean to just shut it off?

The Witness: Just shut it off.

The Court: Above freezing?

The Witness: Above freezing.

The Court: But the unit had to be larger?

The Witness: The unit had to be larger. That is still present practice. I don't believe there is any argument with that at all.

The Court: You mean the unit had to be—

The Witness: If we had a one-ton load, we would want to pick a unit with more than one-ton load, one-ton capacity, so that it could shut down sufficient time to defrost itself by virtue of air at greater than freezing passing over it.

Q. By Mr. Neave: That, I understand, is where you have above-freezing temperatures?

A. Yes, sir. [1282]

Q. Now, what is the situation where you had below freezing temperatures?

A. Below freezing, there were several methods by which these units could be defrosted.

Mr. Lewis Lyon: Your Honor, I don't think the question was by what they could be done. We know a lot of

(Testimony of Joseph Reddington Chamberlain)

things now that they obviously didn't know then, as shown by their own catalogue. It is only a question of what methods were used, not what methods could be used.

The Court: I think that is what his question comprehended.

Mr. Neave: That is right.

Mr. Lewis Lyon: That isn't what the witness said.

Mr. Neave: Just confine yourself to what was used, Mr. Chamberlain, if you will.

The Witness: The defrosting methods that were used by the York Corporation—

The Court: On these units on Exhibit 106.

The Witness: On these units on Exhibit 106, are—

The Court: Were. He is asking about prior to 1937.

The Witness: Were,—air, and when I say air I mean air higher than 32 degrees, sometimes termed warm air.

When the unit was refrigerated with brine, warm brine was circulated through the coil and by warm brine I mean brine with a temperature higher than 32 degrees. [1283]

Also gas was used. Gas is derived from the refrigerating machine.

Q. By Mr. Neave: Now let us take up air. How is the air introduced into the unit?

A. In the case of air, duct work was arranged in such manner that the air to the unit could be shut off from the refrigerated space, and air from the unit could be shut off—

The Court: Wait a minute. Air to the unit from the refrigerated space—I understand. All right.

The Witness: Air from the refrigerated space to the unit could be shut off, and a similar set of dampers to the outside opened and by means of continuing the fan opera-

(Testimony of Joseph Reddington Chamberlain)

tion air was circulated over the coils drawing air from a warm source and discharging it back outside of the refrigerated space.

The Court: By that method the refrigerating unit had to be isolated from the refrigerated space, the space desired to be refrigerated during the time of defrosting?

The Witness: The unit itself did not necessarily have to be isolated but the air communication from the unit to the refrigerated space was isolated.

The Court: That is what I mean.

The Witness: Yes, sir.

The Court: It was isolated in the sense that there was no common circulation of air. [1284]

The Witness: No common circulation into the refrigerated space or from the refrigerated space.

Q. By Mr. Neave: When such a unit was placed inside the refrigerated space and air defrosting was used, did any of the air for the defrosting get out into the refrigerated space.

A. Not if we could help it. I say that because there may have been leaks due to improper connections or poor joints in duct work. But ostensibly and substantially no air could get into the refrigerated space.

Q. That is, the air came in through the duct work into the unit, through the unit and out again through duct work? A. Correct.

The Court: So that the air in the refrigerated space remained still?

The Witness: Correct.

The Court: And therefore had a tendency to retain its colder temperature.

The Witness: Whatever it had; yes, sir.

(Testimony of Joseph Reddington Chamberlain)

Q. By Mr. Neave: How long did it require to defrost with hot air, or warm air?

Mr. Lewis Lyon: That is objected to as obviously a question that depends upon the capacity and so many other things.

The Court: Let us take any one of these individual machines here. [1285]

Mr. Lewis Lyon: It depends on temperature, it depends upon many things, your Honor.

Mr. Neave: Suppose we let the witness answer and see what he says.

The Court: Let's take one machine. Let's take F. B. 800.

The Witness: That depends on a great many things, as Mr. Lyon has already suggested to me. It depends on how much frost there is, how much air is circulated over the coils, the temperature of that air. If the unit is operated in accordance with instructions it should not take more than 10 minutes to 30 minutes.

The Court: Let me ask a question. Assuming that F. B. 800 was used to maintain a temperature in a room or space, whatever you call it, locker room, of 10 degrees or below, how long would it take to defrost that unit?

The Witness: Your Honor, my answer was inclusive of all the units, and it applies the same to the F. B. 400 or 800, or any of them, because they are in proportion larger, they have a proportionately larger amount of air.

The Court: Let's stick to F. B. 800.

The Witness: I would say specifically that that would require from 10 minutes to 30 minutes to defrost the unit.

(Testimony of Joseph Reddington Chamberlain)

The Court: By air?

The Witness: By air. [1286]

The Court: And used to keep a room temperature fitted to the size at 10 or below?

The Witness: Correct.

The Court: 10 minutes to 30 minutes?

The Witness: Yes, sir.

The Court: All right. I think it is time to recess. How much longer will you be with this witness?

Mr. Neave: Well, your Honor, I would say I am a little more than about a third of the way through his testimony. We took about an hour this afternoon, I believe. I think we would get through probably in an hour and a half or an hour and three-quarters. He is our last witness on our case.

The Court: You will have rebuttal?

Mr. Lewis Lyon: Yes, your Honor.

The Court: How many witnesses?

Mr. Lewis Lyon: Four, as I see it at the present time.

The Court: Factual witnesses?

Mr. Lewis Lyon: Yes, three factual and one expert.

Mr. Neave: I think I will take longer than an hour and three-quarters, your Honor.

The Court: What I am trying to think about is whether or not we can finish all the evidence tomorrow, and that will give you tomorrow night for all of you gentlemen to read these volumes of transcript and get ready for argument the next morning. [1287]

Mr. Neave: I think it is unlikely that we can finish tomorrow. I don't know, though, because I don't know how long Mr. Lyon's witnesses are going to be.

(Testimony of Joseph Reddington Chamberlain)

Mr. Lewis Lyon: Not any of them are going to be very long.

The Court: I will have to finish this case this week because I have to start the criminal calendar Monday morning, and I cannot postpone that. I do not think that it would be wise to have some other judge hear the argument after I heard the testimony.

Mr. Neave: No, your Honor, we wouldn't want that. I don't know what your practice is about Saturday.

The Court: I never come down Saturday except I have been here every Saturday since I got back from my vacation all day.

Mr. Lewis Lyon: I don't see any reason why, if the testimony of this witness isn't so long we can't finish the testimony tomorrow, your Honor.

Mr. Neave: How long argument would your Honor want on this?

The Court: Until one side or the other satisfies me. I don't know.

You say you had another memorandum of law?

Mr. Neave: We have no memorandum of law. There is a point of law that I want to make, and I will cite some cases to your Honor about it, and if your Honor is interested in [1288] having a memorandum I will have it prepared.

The Court: Can you have that prepared and sent up tomorrow?

(Testimony of Joseph Reddington Chamberlain)

Mr. Neave: We are having a lot of difficulty getting typewriting help, and I don't know just when we will get at it. I think the point I want to make I can make to your Honor on the argument, as far as the law is concerned.

The Court: How long would you gentlemen want to argue? How long do you think you would need?

Mr. Lewis Lyon: I think about one hour could dispose of the matter, unless there are some particular points that your Honor desires to direct attention upon.

The Court: And you?

Mr. Neave: I never like to talk more than an hour but I find that these things stretch out.

The Court: Yes, they do.

I had in mind that I would like to allow about a day for argument on both sides, and I had hoped to be able to finish all of the evidence at least tomorrow and argue Friday.

Mr. Neave: Perhaps we can.

The Court: Let us see if we can do that, even if we have to stay late tomorrow evening.

Recess until 10:00 o'clock.

(Whereupon, at 4:35 o'clock p. m., a recess was taken until 10:00 o'clock a. m., Thursday, September 26, 1946.) [1289]

Los Angeles, California, September 26, 1946, 10:00 o'clock a. m.

The Court: Ex parte?

The Clerk: No ex parte, your Honor. Further trial.

The Court: Proceed.

Mr. Neave: Mr. Chamberlain.

JOSEPH REDDINGTON CHAMBERLAIN

the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Neave:

Q. Mr. Chamberlain, when brine is used as a refrigerant, how cold can it be made?

A. It can be made almost as cold—any degree—minus 30 in the case of calcium brine, or even lower with some of the special brines now in use.

Q. When we closed yesterday we had been discussing the use of warm air defrosting. Now prior to September 1937 did you sell blower units for below freezing temperatures with brine spray defrosting equipment?

A. Yes, we did.

Mr. Neave: I would like to have drawing 152895 marked as Plaintiff's Exhibit 108, and drawing 15347 marked as Plaintiff's Exhibit 109, and drawing 153423 marked as Plaintiff's [1293] Exhibit 110.

The Court: That is for identification?

Mr. Neave: Yes, your Honor.

(The documents referred to marked Plaintiff's Exhibits 108, 109 and 110 respectively for identification.)

(Testimony of Joseph Reddington Chamberlain)

By Mr. Neave:

Q. Now, Mr. Chamberlain, can you identify these three drawings, Plaintiff's Exhibits 108, 109 and 110?

A. I can. The first drawings shows an assembly—

Q. Which one of them is that, 108?

A. I don't know how you have them numbered.

Q. That is drawing No. 152895? A. Correct.

Q. Just mark on it "108."

A. Exhibit 108 shows an assembly of the F. B. 1400 D-5 air unit and lists thereon the various modifications. Among these modifications are the spray header for defrosting as shown on Exhibit 109, and the standard catch pan or drip pan as shown on Exhibit 110 for use when this particular unit is being defrosted by means of brine.

The Court: This is brine applied to the outside? You are not thinking of the refrigerant brine.

The Witness: No, sir. I am talking about brine sprinkled over the coils for the purpose of defrosting.

The Court: On the outside of the coils? [1294]

The Witness: Yes, sir. Through the coils may be either brine or a refrigerant.

The Court: But in discussing these particular plans shown here in this scheme, when you use the word "brine" you mean the brine outside?

The Witness: Yes, sir. [1295]

Q. By Mr. Neave: Now, where was the header shown in Plaintiff's Exhibit 109 placed with respect to the coils which are shown in Plaintiff's 108?

A. The header was placed above the coils as indicated in Exhibit 109, Section AA, in the left-hand corner of the drawing, showing the top row of coils and the application of those headers to the unit in relation to the fan.

(Testimony of Joseph Reddington Chamberlain)

Q. Where was the pan in Plaintiff's Exhibit 110 placed with relation to the unit as shown in Plaintiff's Exhibit 108?

A. The pan is placed beneath the unit, in place of the pan shown on the drawing, Exhibit 108. The unit sets into the flat portion of the pan shown in 110. The flat portion you will note is 2 feet 3 inches, whereas the width of the unit itself is 2 feet $1\frac{3}{8}$, so that it would set into that flat portion.

Q. Now, were these units, with the header and pan shown in these drawings, those that you testified were sold prior to 1937?

A. They were.

Q. Now, will you explain just how the brine spray defrosting took place in this unit?

A. When it was necessary to defrost, the fan was shut down and brine fed into the header from either outside or inside the refrigerated space; was pumped in the header and [1296] allowed to sprinkle the coils by means of the nozzles indicated on the drawing, as shown in 109. The spray header there indicates nozzles thereon by the numeral 70904-F No. 1, which is the York pattern number for that particular size nozzle. Brine was recirculated by means of the pump, usually.

Mr. Lewis Lyon: The pump is not shown on any of those drawings, is it?

The Witness: No, sir.

Mr. Lewis Lyon: Neither is the concentration tank.

Q. By Mr. Neave: Where did the brine go—

A. The brine was caught—

(Testimony of Joseph Reddington Chamberlain)

Q. —from the pan?

A. It was caught in the pan and returned to a brine tank within the plant somewhere. It may have been an existent tank or one particular for the purpose.

Q. Was the brine tank installed inside or outside of the refrigerated space?

A. It could be installed either outside or inside the refrigerated space.

Q. In the installations with which you are familiar, which was it? A. I have seen them both ways.

Q. Now, how long did it take for the brine spray to defrost these units?

A. That again depended a great deal upon how much frost [1297] was necessary to be removed, but ordinarily it took two to five minutes.

Q. What effect did this brine defrosting of these units have upon the temperature of the refrigerated space?

A. It didn't affect the refrigerated space to any appreciable amount.

Q. Now, do you sell, or have you sold, since 1940, units similar to those shown in Plaintiff's Exhibits 108, 109 and 110 with brine spray defrosting equipment?

A. We have.

Q. And they are operated in the same manner as you described?

A. They are operated in the same manner as described.

Q. Were units such as shown on Plaintiff's Exhibit 106 sold prior to September, 1937, with gas defrosting for below freezing temperatures? A. They were.

(Testimony of Joseph Reddington Chamberlain)

Q. Will you explain how gas defrosting operates?

A. Gas defrosting operates by means of admitting gas to the coils, either top or bottom, and within the coil the gas gives up its latent heat of condensation, and thereby heats the inside of the coil and thus melts the frost.

Q. What were these gases you are talking about?

A. These are the gases that are used as the refrigerant. [1298]

Q. And where do they come from?

A. They came from the high side of the compressor, that is, the discharge side of the compressor.

Q. In order to defrost, do these gases have to be at a high temperature? A. They do not.

Q. When you said you used latent heat, what do you mean by latent heat?

A. I mean the heat required to condense a refrigerant gas. Just generally known as the heat of condensation. It is just the opposite from the heat of evaporation.

Q. What is sensible heat?

A. Sensible heat is the heat required to change the temperature of a substance as contrasted to latent heat, which is the heat required to change the state of a substance from and at a given temperature and with a given pressure.

Q. Did you say "from and at"? A. Yes, I did.

Q. Now on this gas defrosting, what actual physical acts did you have to do in order to defrost?

A. Shut off the fan, shut off the suction valve to the machine, that is, the compressor or the suction line from the unit, and open a gas valve, either line the gas into the top or the bottom of the coil. It made no difference

(Testimony of Joseph Reddington Chamberlain)

where. In some cases, however, it was necessary to shut off the refrigeration and remove some of the refrigerant that would be in the coil, and in addition sometimes as a means for keeping the coil drained while defrosting was used. It all depended upon what volume might be available within the coil to take the condenser refrigerant which was condensed during the defrosting operation.

Q. How long does it take to defrost by gas?

A. That again depended upon how much frost was on the coils and whether the operator followed recommendations. However, it could be done very easily from 10 to 15, maybe 20, minutes in the average case.

Q. What relation is there between the pressure and temperature of gases in these coils?

A. The pressure and temperature within the coil have to do with the rate of admitting gas from the high pressure side and how fast the gas is evaporated in the coil. Ordinarily the temperature and pressure are both rather low.

Q. Is there any particular relation between the two?

A. Every refrigerant has a particular pressure, particular temperature for a particular pressure.

Q. As the pressure goes up does the temperature go up or down?

A. They go together. When the pressure goes up the temperature goes up, and vice versa.

Q. What effect did defrosting by gas have upon the [1300] refrigerated space with these units?

A. It had no effect. The fan was shut down and any gas that was admitted was admitted within the coil itself.

(Testimony of Joseph Reddington Chamberlain)

Q. Since 1940, have you sold units with gas defrosting, blower units? A. We have sold many of them.

Q. Similar to those shown in 106?

A. Many of them.

Q. You heard Mr. Jarvis testify in this case?

A. I did.

Q. Do you agree with him that defrosting was the biggest problem that the industry had to solve before the present day frozen food industry could begin to travel?

A. I do not.

Q. Why not?

A. Well, in the first place, we have many problems besides defrosting and we already had very good means of defrosting, which we still use today.

Q. What factors determine the kind of defrosting which you will sell with an equipment?

A. That is determined by the plant size, the application, the facilities within the plant, whether it has more than one evaporator or a single evaporator, the size of the plant—I think I have mentioned about everything I can think of in that. [1301]

Q. Let us take up each one of the various means of defrosting that you have mentioned. Take air defrosting. Under what circumstances would you sell air defrosting with a unit?

A. Where the unit can be conveniently located to outside sources of air, that is, a source of air outside the refrigerated space without the necessity of complicated and expensive duct work.

Q. What about warm brine in the coils?

A. Warm brine through the coils was the usual method where brine is used as a refrigerant.

(Testimony of Joseph Reddington Chamberlain)

Q. Have you since 1940 sold—

The Court: What is the last statement, warm brine through the coils was the usual method where brine is used as a refrigerant?

The Witness: Yes.

The Court: When you use brine there you use it as distinguished from Freon and these other refrigerants?

The Witness: Yes.

The Court: Just plain old brine?

The Witness: Yes, flowing in the coils. There the facilities for defrosting are already available so it is customary to use it.

You asked a question? [1302]

By Mr. Neave:

Q. Since 1940 have you sold installations with warm brine defrosting?

A. We have. In fact, that is the accepted method aboard ship. Since 1943 York has installed over 30 ships for frozen cargo all using brine and that method of defrosting.

Q. What about brine spray, under what circumstances do you sell brine spray defrosting equipment?

A. Where we want to remove the frost rather rapidly, where there are usually the facilities of a brine tank, etc., that already exists; also I can't think of any other reason, just a convenient method if it is handy. That determines what we use.

Q. What effect, if any, does the brine have upon the frost or ice?

A. The brine has a dual effect. It acts to melt the frost the same as would water due to its change in temperature.

(Testimony of Joseph Reddington Chamberlain)

The Court: That is the brine inside?

The Witness: The brine spray over the coils.

The Court: The brine spray?

The Witness: Yes.

In addition brine has a solvent action and dissolves the frost. It acts the same as you witness by putting salt on a sidewalk in the wintertime. It melts the ice. [1303]

The Court: What makes salt melt the ice?

The Witness: Because salt is a low freezing point material. That is, when mixed with water it forms what is known as a low freezing point temperature and therefore when further mixed with water it tends to lower the freezing point of the material that it is going in solution with. So it really goes in solution with water and therefore melts it or lowers the freezing point of the frost.

The Court: That is what it does, but what makes the salt melt the ice?

The Witness: I don't know what makes it.

The Court: All right. You don't know.

The Witness: I do know that it does it.

By Mr. Neave:

Q. Now in the use of the brine spray defrost, does the brine spray get onto the contents of the room, of the refrigerated space? A. No.

The Court: On this matter of defrosting—this is a very practical question—why is it when they want to chill champagne, for instance, or wine you will put ice in the box and salt on it?

The Witness: Just for the reason that I mentioned a little bit ago. The salt lowers the freezing point of the ice, and in doing so— [1304]

(Testimony of Joseph Reddington Chamberlain)

The Court: It lowers the freezing point of the ice?

The Witness: Yes, sir. It lowers the freezing point of the ice and causes a reduced temperature, what is known as a low freezing point mixture.

When the salt dissolves the ice the ice takes up this latent heat of fusion which is the amount of heat that is required to melt a certain amount of ice, and it does so rapidly and so fast that it causes a material reduction in temperature. It lowers the freezing point of the mixture. [1305]

The Court: In other words, it prevents the ice from melting so fast?

The Witness: It makes it melt faster.

The Court: It makes it melt faster?

The Witness: Yes, sir.

Q. By Mr. Neave: In changing the state from the solid to the liquid, what happens?

A. When it changes from solid to the liquid?

Q. Yes.

A. It takes up the latent heat of fusion.

Q. And thereby takes the heat from the champagne, absorbs the heat from the champagne?

A. Correct.

Q. And thereby cools the champagne?

A. Yes. I don't know why we didn't say ice cream.

The Court: Well, you keep ice cream in boxes?

The Witness: Your Honor, we used to freeze ice cream with salt.

The Court: Oh, surely. The old method was to freeze the ice cream with ice and salt around it.

(Testimony of Joseph Reddington Chamberlain)

Q. By Mr. Neave: Now, under what circumstances was gas defrosting equipment sold by York?

A. That is one of the most handy methods we have, provided there is more than one evaporator on a given compressor, so that we can defrost one evaporator while operating the [1306] other, to furnish a heat source to obtain the gas which I just mentioned.

Q. You use the gas from one evaporator to defrost another evaporator?

A. Yes, indeed, and there may be more than one evaporator furnishing gas for the purpose of defrosting a single evaporator.

Q. And there may be more than one compressor for all of the evaporators?

A. Correct.

Q. Now, in gas defrosting, in what condition are the coils left after defrosting?

A. The coils are left perfectly dry.

Q. Will gas defrosting take the frost and ice off the coils, if properly done?

A. It will.

The Court: How long does it take, say, in a 1400 unit, your F. B. 1400?

The Witness: Ordinarily it takes somewhere between 10 minutes and a half hour, depending upon the size of the coil and the amount of frost.

The Court: And there isn't any freezing being done at that time?

The Witness: No, sir.

The Court: Say it is in a room for which you specify that size, heater,— [1307]

The Witness: That's right.

The Court: —to keep it below freezing,—

(Testimony of Joseph Reddington Chamberlain)

The Witness: Correct.

The Court: —would the temperature of that room remain below freezing?

The Witness: It would.

The Court: It wouldn't affect the temperature of the air in the room?

The Witness: No, sir. This coil is enclosed in its own casing, and you admit the hot gas to the coil and the fan is shut down so that it doesn't blow air around, and any effect you would get would be a small effect, right adjacent to the unit, which is the same story in all defrosting regardless of how done, with the exception of where cold brine is used. You might use brine in the room that is being cooled in a brine pipe setting in the room, and that would be as cold as the room itself, and obviously you are not adding any heat.

The Court: When you run that gas through the 1400 feet of pipe in the unit, what becomes of the moisture that is in that ice? Does it go into the air?

The Witness: It goes,—it drops down into the pan below the unit, and is drained away.

The Court: That is true of the brine defrosting?

The Witness: It is, sir.

The Court: And the hot air defrosting? [1308]

The Witness: The hot air.

The Court: Well, we haven't come to the hot air yet.

The Witness: We talked about it yesterday.

Mr. Neave: That was in the ducts. It went through the ducts, went into the unit, and out through ducts.

The Court: In other words, it surrounds the unit?

The Witness: That is right.

(Testimony of Joseph Reddington Chamberlain)

The Court: And the same thing happens there?

The Witness: Correct.

The Court: The ice drops down and melts?

The Witness: Is melted, and the water drops down and is drained away.

Q. By Mr. Neave: Mr. Chamberlain, as to the hot air defrosting, the judge asked you whether the hot air surrounded the unit.

A. The hot air surrounds the coil, is pumped through the units.

The Court: Well, it is on the outside of the coil?

The Witness: It is on the outside of the coil, but inside of the casing.

The Court: I understand. Now, the exhibit with all this fish up in Alaska, what was the number,—No. 103?

Mr. Neave: I believe so. No,—

The Court: I mean the one with the pipe coils all across the ceiling. [1309]

Mr. Neave: 105, I believe, your Honor.

The Court: You remember what I am talking about.

The Witness: Yes.

The Court: How would you defrost that?

The Witness: That could be—

The Court: Oh, I remember now. You testified you run brine through it and take a shovel and scrape it out?

The Witness: I said if brine was used as a refrigerant, the warm brine would loosen it and then we could just knock it off by tapping it with a wooden handle, or something, and then sweep it up.

The Court: You would have to remove all that fish, then, wouldn't you?

(Testimony of Joseph Reddington Chamberlain)

The Witness: Not necessarily. The fish is all frozen. Most of the moisture which is there came from the fish to start with.

The Court: So you let the ice fall on the commodity or on the fish?

The Witness: You could. In addition, the thing you want to remember in regard to that type of job, which is way below freezing, is that the frost isn't necessarily ice. It may be what is called hoarfrost, and whenever the temperature is below or about zero, the frost formed is not necessarily a hard frost. It is a soft, fluffy material. You can sweep it off with a broom. [1310]

The Court: Then it will drop on the food, the commodity, or the contents there, or whatever is underneath?

The Witness: Yes. Ordinarily these coils are placed over the aisles. You have to have certain aisles, passageways, to get—

The Court: Well, they are not that way in this particular fish exhibit?

The Witness: They are not in the fish exhibit, no.

The Court: They are all over the ceiling?

The Witness: Correct.

The Court: What if they were going to store something else there, like ice cream or pie?

The Witness: Well, ice cream or pie would be in closed containers, some kind of a box.

The Court: Necessarily?

The Witness: Why, I have never seen it otherwise, your Honor. Of course, you can leave it open. That is your privilege.

(Testimony of Joseph Reddington Chamberlain)

Q. By Mr. Neave: Now, you spoke about these various methods of defrosting not raising the temperature of the refrigerated space. Do you sell water defrosting equipment now? A. Yes.

Q. Now, when you use water defrosting equipment which you sell, is the temperature of the refrigerated space raised [1311] any more or any less than with these other types of defrosting? A. The same thing exactly.

Q. And that is because it takes place inside of this enclosed unit? A. Correct.

Q. Now, in each of these methods of defrosting, including water defrosting, what is it that melts the frost or the ice?

A. All methods of defrosting require heat to melt the ice, with the exception of the brine spray method which utilizes the solvent action of the salt for defrosting,—

Q. In addition,—

A. —in addition to the temperature change.

Q. When a compressor is stopped and refrigerant is still left in the coil, what change of temperature takes place in the coil?

A. When the refrigeration is stopped, we are talking about?

Q. We are talking about the compressor being stopped.

A. Yes, but we are talking about direct expansion, and not the brine through the coils?

Q. No. I am talking about ammonia or Freon.

A. As soon as the refrigeration is stopped, the temperature in the coil reaches the temperature of the ice on the coil or frost on the coil, and the pressure existing in the [1312] coil will be that corresponding to the tempera-

(Testimony of Joseph Reddington Chamberlain)

ture in the coil, and as heat is added to that coil for the purpose of melting frost, the temperature of the refrigerant will raise, because the coils have been raised in temperature, and the pressure will likewise be raised with a temperature corresponding—I mean, a pressure corresponding to that temperature. There is in a refrigerant or any material that can be vaporized a very definite temperature for each pressure, or very definite pressure for each temperature. That we call temperature corresponding to the pressure. It is the same with steam, or water, or what-have-you.

Q. Can you tell me— As an example, suppose that you had a coil which had been raised to a temperature of 70 degrees by 70-degree water. What would be the corresponding pressure in that coil if the refrigerant were ammonia, let us say?

A. If it were ammonia, the temperature would approach 70 degrees, if you put 70-degree water over the coil. You are assuming that the refrigeration has been stopped?

Q. Yes, in the condition I described.

A. And the pressure attained then would correspond to approximately 70 degrees, which will be about 114 pounds gauge pressure.

Q. In the coils? A. In the coils. [1313]

Q. Now, in that condition—

The Court: What do you mean by 114 pounds gauge pressure?

The Witness: Your Honor, pressure is measured in two manners; first, absolute pressure, which is the pressure read on the gauge— —

(Testimony of Joseph Reddington Chamberlain)

The Court: That is the total pressure?

The Witness: —plus the pressure of the atmosphere or 14.7 pounds per square inch. Gauge pressure is the pressure read on the gauge you are looking at.

The Court: You say it is 114. That is 114 pounds per square inch?

The Witness: Per square inch, yes, sir.

The Court: But you don't have a square inch.

The Witness: Yes, sir. 114 pounds per square inch, that is the unit of pressure. You can say square foot or square inch, and it doesn't mean you have a certain dimension, but it means that it is measured in that unit of pressure.

Q. By Mr. Neave: Well, if you have a condition where the coil is at 70 degrees, and the pressure is 114 pounds, would you say that was a critical pressure within the coil?

A. No, indeed, that is not a critical pressure.

Q. Prior to 1937 what ammonia pressures were developed in the coils or units, blower units, sold by York, with gas [1314] defrosting?

A. Whatever pressure was necessary to melt the frost off the coils, and the frost would be removed from the coils before they got anywhere near the condensing pressure of the system, which may be 150 to 185 pounds gauge pressure per square inch, I should say.

Q. By the time the frost was removed from the coils, what would be the pressure in pounds within the coil? Would it be below 114 pounds?

A. It may be 100 pounds or 114, but wouldn't go much higher than that.

(Testimony of Joseph Reddington Chamberlain)

Q. Now, in water defrosting does the water freeze on the coil during the defrosting operation?

A. No. [1315]

Q. Why is that?

A. If water is left on a coil below freezing, such as a drop of water, that drop will freeze when the temperature of the water has first been reduced to 32 degrees Fahrenheit, and then the latent heat of fusion has been removed, amounting to 144 B.T.U.'s per pound.

On the other hand, if the water is flowing over the coil it has a greater mass and flowing over the coil with this great mass it does not stay long enough to either absorb enough heat to reduce itself to 32 degrees nor to absorb the 144 B.T.U.'s which is the latent heat of fusion.

The Court: Why bother with brine at all then, if water would do the same thing?

The Witness: Brine has an additional advantage, your Honor, in that it can be used even though the brine is cold because of the solvent action of brine. And it is rapid. It is a rapid means of defrosting. It also does not have to have any precautions taken concerning a freeze.

By Mr. Neave:

Q. In this brine defrosting, is the brine thrown away after the spray has defrosted it once

A. The brine is re-circulated but additional salt must be added to maintain its concentration above a point to prevent it from freezing.

Q. With respect to your sales of blower units, since [1316] 1940, what proportion of blower units of York manufacture equipped with water defrost, exclusive of Government sales, have you made of your total blower unit sales?

(Testimony of Joseph Reddington Chamberlain)

Mr. Lewis Lyon: That is objected to on the ground the witness hasn't in any way been qualified to answer the question.

Mr. Neave: Do you know?

Mr. Lewis Lyon: He is purely an engineer.

By Mr. Neave:

Q. Do you know, Mr. Chamberlain?

The Witness: Yes, I know.

The Court: If he knows, he can answer it.

The Witness: Very close to 11 per cent.

The Court: That is since when?

Mr. Neave: 1940.

The Witness: 1940.

The Court: 11 per cent. Is that in numbers or is that—

The Witness: In units.

The Court: —in refrigerating tons, or whatever you measure it by?

The Witness: It is in number of units, not in tons.

The Court: Number of units?

The Witness: Yes, sir.

By Mr. Neave:

Q. Blower units? [1317]

A. Number of factory built blower units.

In tons the figure would be very much less.

The Court: It would be less?

The Witness: Very much less.

The Court: As they are used in the smaller units?

The Witness: They are, sir.

(Testimony of Joseph Reddington Chamberlain)

By Mr. Neave:

Q. In your experience, is specific heat measured in terms of volume?

A. The accepted definition of specific heat is in terms of weight. The definition itself says unit weight.

Q. That is the definition of specific heat?

A. That is the accepted definition of specific heat.

The Court: Unit weight?

The Witness: Yes, sir.

That means one pound or one kilogram or what have you, depending upon the system of measurement. In other words, if you are using the metric system it would be per gram or in the case of the English system it would be per pound of a substance. That is the reason I said unit weight, because it can apply to either system of measurement.

The Court: What has specific heat to do with unit weight?

Mr. Neave: The definition of specific heat brings in the question of weight, that is the way you define it, as I under- [1318] stand it, and Mr. Doble the other day said that there might be two ways of figuring specific heat. I am asking the witness for his views on that.

The Court: I see. All right.

By Mr. Neave:

Q. Will you turn to Defendant's Exhibit S, at page 43, and I call your attention to the top of the left-hand side of the page.

The Court: Defendant's Exhibit S?

Mr. Neave: Yes.

The Court: What is it?

(Testimony of Joseph Reddington Chamberlain)

(The document referred to was exhibited to the court.)

The Court: Yes, I remember it.

By Mr. Neave:

Q. Now there it says: "These chillers must not be used in fresh meat or vegetable rooms * * *"

Now to what chillers is this exhibit referring?

A. Referring to what was known as a fan fin spaced chiller. As a matter of fact, as manufactured by York Corporation the units were specifically designed for refrigerating rooms having the food in packages and not for meat or vegetables open. They were not equipped with humidifying means and therefore if they were applied indiscriminately to fresh meats and vegetables they would dehydrate the product.

Q. Did not these units frost up? [1319]

A. Yes, they did.

Q. What did you do about it?

A. They were limited to temperature of 35 degrees or higher, as stated, and a minimum evaporated temperature of 25 degrees, so that that established a cycle of operation. When the units shut down automatically the fan continued to run and with a temperature in the room of higher than 35 degrees they would automatically defrost. That was the reason for that statement.

Q. Now will you turn to the second page, page 44, of Exhibit S, and in the second column toward the bottom it states: "Defrost the chiller after the moth-killing operation; the condensing unit must be shut down manually. The defrosting is accomplished while the temperature is rising to 40 degrees Fahrenheit."

(Testimony of Joseph Reddington Chamberlain)

Now why was it done that way?

A. You have to read the rest of the story under fur storage to understand what that one paragraph means.

In the first place, fur storages are maintained at somewhere between 40 and 45 degrees, substantially above freezing, and then it is necessary periodically to drop the temperature to around 20 degrees in order to kill the moth larvae that might be in the furs. At least it stunts them and prevents them from growing.

The Court: It permanently stunts them? [1320]

The Witness: Yes, sir. It kills moths when you go down to low temperature, because they can't exist, and that operation is over the weekend usually, when the room is shut down and there is no traffic in and out of the room. At that time they set the thermostat low, let the thing pull down and hold it over the weekend or 24 to 48 hours, as stated.

Then the thermostat is set back up to its normal temperature of 40 to 45 and is shut down manually so it will warm up. We have to get heat from somewhere, which is from the walls of the room, and it takes a while for it to warm up. After it is warmed up the temperature is above 40 and above freezing and it will defrost itself, and why add expense of defrosting when you have got the means already available?

By Mr. Neave:

Q. In your brine spray defrosting—I am not sure whether I asked you this question—you stated, I believe, that the brine was re-circulated? A. Yes.

Q. Now where did the brine go when it was caught in the pan? Did it stay there or did it go outside?

(Testimony of Joseph Reddington Chamberlain)

The Court: He testified to that. He said it would stay right in the room. Sometimes it didn't and sometimes it did.

The Witness: That is right. [1321]

By Mr. Neave:

Q. When it stayed right in the room it was subject to the below freezing temperatures of the room?

A. Correct.

Q. And why didn't it freeze then?

A. Because it had a sufficient amount of salt, it should have sufficient salt dissolved in it, to prevent it from freezing at that particular room temperature.

Q. Now will you state whether or not it is possible for the wall of a refrigerated space to be above freezing although the air of the space may be below freezing?

A. It is certainly possible.

Q. Why is that?

A. It is possible because insulation on the wall of a refrigerating room is a heat retarder, not a heat stopper. Therefore you can establish a temperature gradient through the wall, that is, the gradient is high on the outside, low on the inside, and that gradient, being the function of the installation, its condition, the thickness and what kind it is, can easily establish a temperature above freezing at the wall and still be maintaining a below freezing temperature within the room. That is, the skin or film right at the wall can be above freezing whereas in the middle of the room it can be below freezing.

The Court: You mean a thin layer of air immediately adjacent [1322] to the wall.

The Witness: Correct.

(Testimony of Joseph Reddington Chamberlain)

The Court: Or the wall itself?

The Witness: The wall itself or the air adjacent to that wall. You can assume it either way, because we are thinking about a very thin film, you might say.

The Court: What is your idea of very thin?

The Witness: Well, it depends on what we are talking about, sir.

The Court: You said a very thin film of air. That is what we are talking about.

The Witness. All right. I will say it is a quarter of an inch thick.

By Mr. Neave:

Q. What do you do to determine the grains of moisture in the air?

A. We measure the wet bulb and the dry bulb by means of instrument known as a psychrometer.

Q. What is that instrument?

A. That consists of a wet bulb and dry bulb thermometer located together, one of which is covered by a wick wet with water, the other one dry. Those two together are sometimes slung—in that case it is known as a sling psychrometer—or they can be placed in an area of a pipe where definite air velocity is blown over the two thermometer bulbs. [1323]

Q. What do you do with the readings from the psychrometer to determine the grains of moisture?

A. We refer to psychrometric tables, and once knowing the wet bulb and dry bulb the difference between the two is known as the wet bulb depression. Then there are psychrometric tables establishing grains of moisture per

(Testimony of Joseph Reddington Chamberlain)

cubic foot of air by means of wet and dry bulb temperatures.

Q. Does it make any difference as to what is the temperature of the air in determining the number of grains in the air?

A. It doesn't make any difference what the temperatures might become after the air has first been treated. That is to say, if we take a sample of air after it has been treated and after it has traveled for great distances and changed its temperature, it makes no difference in the reading because you have neither added nor subtracted moisture, but you will read a different temperature on the psychrometer.

Q. When you say it makes no difference in the reading, in the reading of what?

A. In the reading that you obtain from the tables in terms of grains of moisture per cubic foot.

Q. In order to get the grains of moisture contained in that air, you mean?

A. That is correct. As long as no grains of moisture have been added in transit. [1324]

Mr. Neave: I would like to have a form marked as Plaintiff's Exhibit 111.

(The document referred to was marked Plaintiff's Exhibit No. 111 for identification.)

By Mr. Neave:

Q. Mr. Chamberlain, what is the form, Plaintiff's Exhibit No. 111?

A. That is part of the standard York Corporation contract which is used on all jobs.

Mr. Neave: I call your Honor's attention to paragraph 7 which contains the guaranty form.

(Testimony of Joseph Reddington Chamberlain)

I would like to offer Plaintiff's Exhibits 108 through 111 inclusive in evidence.

Mr. Lewis Lyon: Your Honor, this last document referred to is obviously improper. There is no showing that it was ever used. It is merely a self-serving statement, merely the ordinary guarantee that anybody will stipulate to as to defective parts.

The Court: Under the California law they wouldn't need to put it into the contract.

Mr. Lewis Lyon: That is right.

The Court: It is part of the law anyhow.

Mr. Lewis Lyon: That is right.

The Court: I do not see how it is material, counsel.

Mr. Neave: I would like to have in the record show-[1325] ing that it is the established contract form of the York Corporation.

The Court: For what, just for that purpose?

Mr. Neave: Yes, sir.

The Court: Why is that material? That is a different guaranty that satisfaction guaranteed. That is a very broad order, I would think, satisfaction guaranteed.

Mr. Neave: That may go to the weight, your Honor. [1326]

Mr. Lewis Lyon: It goes to its materiality.

The Court: It is a different thing. Guarantees all machinery and materials against defects and workmanship.

Mr. Neave: It seems to me to be entirely a question of degree, your Honor.

(Testimony of Joseph Reddington Chamberlain)

The Court: Paragraph 10 has some modified form of guaranty. But I cannot see how it is material, counsel. Objection sustained.

The others are admitted.

(Plaintiff's Exhibits Nos. 108, 109, and 110 were received in evidence.)

[Note: Plaintiff's Exhibits Nos. 108, 109 and 110 will be found in the Book of Exhibits at pages 1313, 1314 and 1315.]

Mr. Neave: 111 is marked for identification?

The Court: Exhibit 11 is marked for identification.

By Mr. Neave:

Q. Did you hear Mr. Tuttle testify in this case?

A. Yes, sir.

Q. To your knowledge did York try out water defrosting years ago and find it didn't work?

A. Not to my knowledge.

Mr. Neave: That is all.

Mr. Lewis Lyon: I have very few questions, your Honor.

Cross Examination

By Mr. Lewis Lyon:

Q. In this hot brine or brine defrosting method using the brine on the outside of the coils as evidenced by the [1327] drawings which you have put in here as Exhibits 108, 109 and 110, those do not show all the equipment that is required, do they, for such an operation?

A. No, indeed.

Q. They don't show the pump? A. No.

(Testimony of Joseph Reddington Chamberlain)

Q. They don't show the concentration tank for maintaining brine concentration at the required degree of concentration, do they?

A. No, those drawings don't show that.

Q. They don't show the necessary use of some means of measuring at least at regular intervals the concentration of the brine as it is stored and recirculated through the holding or brine tank, do they? A. No.

Q. There is some such means required, isn't there?

A. Correct.

Q. It is usually a density measuring device, isn't it?

A. It is known as a hygrometer.

Q. In other words, to maintain that system in operation it requires an engineer in attendance who can understand the use of such instruments and can operate and maintain the concentration of the brine, doesn't it?

A. I wouldn't say that it requires an engineer. It requires an individual who can be taught sufficient to do the [1328] operation.

Q. And has to be in constant attendance?

A. Not necessarily in constant attendance.

Q. At least enough intermittent attendance so that the brine concentration doesn't change or the brine will freeze, isn't that correct?

A. Not necessarily so. In many cases salt in a mixing basket is placed right in the brine tank so that as he weakens the brine more and more salt is dissolved as the brine is circulated over the coils so that it doesn't need anybody to touch it.

(Testimony of Joseph Reddington Chamberlain)

Q. That is if he can stick a hunk of salt in the water and let the water dissolve the salt off.

A. He can let the water dissolve the salt as it is needed.

Q. And that salt that is added by that way doesn't have any corrosive action on any of the equipment, does it?

A. Not necessarily.

Q. Unless there are precautions taken to either coat the pipes with tar or something else, it must have a corrosive effect, doesn't it?

A. No, brine does not have a corrosive effect.

Q. Salt does not have a corrosive effect?

A. Not necessarily.

Q. Well, it does on this apparatus, doesn't it? [1329]

A. So does water, sir, and so does air. When you say "corrosive" you must be sure to say what type of corrosion you mean. There are lots of kinds. Some may be called electrolytic actions, and some may be the corrosion of intermolecular corrosion.

Q. The kind of corrosion I am talking about is the same kind of corrosion that you get on all metal surfaces when you take them down near the ocean and the salt water.

A. You are talking about rust.

Q. That is corrosion, isn't it?

A. Rust is a corrosion; yes.

Q. That is what I am talking about, and brine has the same corrosive effect as the salt sea water, doesn't it?

A. Yes, and so does water.

Q. But not to anywhere near the same degree.

A. That isn't necessarily true. It can vary a great deal with lots of conditions, sir.

(Testimony of Joseph Reddington Chamberlain)

The Court: Does the brine rust the pipes or not?

The Witness: Brine rusts the pipes.

The Court: All right. Does it rust those pipes that you use more than plain water does?

The Witness: Not necessarily so.

The Court: Does it?

The Witness: Sometimes yes and sometimes no, sir.

The Court: Do you use galvanized pipes? [1330]

The Witness: Yes, sir, hot dipped galvanized.

By Mr. Lewis Lyon:

Q. Did you ever actually measure the temperature of a coil of a Recold unit during water defrosting?

A. That is the first Recold unit I have ever seen. (Indicating) I have not.

Q. You never measured the coil temperature during defrosting of such a unit?

A. I have not. Wait a minute. I said of a Recold unit.

Q. That is right. A. All right.

Q. This solvent action of brine that you speak of on ice, isn't that merely the fact that you reduce the temperature of the water and that the salt doesn't dissolve ice, not in the ordinary sense of solution, does it?

A. I think I said it was the solvent action of salt on ice when it goes into solution with the ice by virtue of the fact that salt and water mixture reduces the freezing point of the mixture.

Q. It reduces the freezing point of the ultimate solution of water and salt, not of the ice, though?

A. And in doing so it dissolves ice.

(Testimony of Joseph Reddington Chamberlain)

Q. And in doing so it causes the ice to melt faster, is that not true? [1331]

A. It doesn't necessarily cause ice to melt, it dissolves the ice, takes it into solution. Melting ice is one thing, taking it into solution is another.

Q. You mean that the ice melts and the water runs into the other water, that that is what you mean by solution then? A. You can say it a great many ways.

Q. But that is what you mean?

A. But the fact is that salt will dissolve ice because it takes it into solution, and technically I think I am correct in that statement.

Q. It makes the ice melt and the water run into the rest of the water, is that what you mean?

A. No, I won't attest to that particular way of saying it.

Q. What is wrong with it?

A. Well, you are talking like we take ice in one hand and salt in the other and run them together and one runs into the other. I don't look at it that way.

The Court: What is the difference between melting and going into solution?

The Witness: Melting is a heat change process principally; going into solution may not necessarily mean any heat.

The Court: You mean when the ice melts and you put salt on it there is no heat?

The Witness: Yes, there is heat generated. [1332]

The Court: That is what makes the ice melt or go into solution?

The Witness: Either way.

(Testimony of Joseph Reddington Chamberlain)

The Court: It is the heat?

The Witness: Well, it could be said to be heat.

The Court: That is what melts ice, is heat?

The Witness: It can be dissolved.

The Court: What dissolves ice is heat, isn't it?

The Witness: No, I think you can do the same thing and have the thing exactly at the same temperature and never change the temperature, or have it at a lower temperature and do the same thing.

The Court: You mean you can have ice below 32 degrees—

The Witness: Yes, sir.

The Court: —and dissolve it?

The Witness: Yes, sir.

The Court: With salt?

The Witness: With salt, sir.

Mr. Lewis Lyon: Without melting it?

The Court: Without melting it?

The Witness: It disappears. You melt it. If you want to say you no longer have ice, you certainly say it melted it.

Mr. Lewis Lyon: It has given up its heat of fusion?

The Witnesses: It has. [1333]

Mr. Lewis Lyon: So it is no longer ice?

The Witness: Correct.

Mr. Lewis Lyon: That is all.

Mr. Neave: That is all, Mr. Chamberlain.

The Court: I want to ask a question.

A while ago counsel asked you what percentage of your units were water defrosting units and you said about 11 per cent.

(Testimony of Joseph Reddington Chamberlain)

The Witness: Yes, sir.

The Court: I have forgotten since when.

The Witness: 1940.

The Court: Why didn't you sell water defrosting units before then?

The Witness: We had these other means of defrosting which I just discussed which were at that time perfectly satisfactory.

The Court: If they were satisfactory why do you sell the water defrosting?

The Witness: Water defrost jobs are used in our case on installation of the smaller variety where these other facilities are not available. For example, we couldn't use air, even on a small job, if the duct work may become too expensive, nor could we use brine on a small job. We could, but it may be more expensive than water.

The Court: It would be more expensive to install and to [1334] operate?

The Witness: It may be.

The Court: So that the water has the advantage of being less expensive?

The Witness: On the other hand, on a job having more than one evaporator, even though it may be a small job, the less expensive way to do the job is hot gas. But again we have to have some source of heat. In the case of a job with one evaporator and one compressor, then that would be where we would almost be forced to use water.

The Court: To what do you attribute the increase in the use of the water method of defrosting?

(Testimony of Joseph Reddington Chamberlain)

The Witness: I don't quite get your question, your Honor.

The Court: Well, since 1940, 11 per cent of your sales have been water defrost type. To what do you attribute that increase in demand?

The Witness: To more smaller installations. Rather than build the large warehouse facilities, which incidentally have become quite loaded to capacity, more and more people are building these smaller plants to take care of their own products. [1335]

The Court: So that water defrosting is less expensive and less bother and more convenient for the smaller plants?

The Witness: For the smaller plants, yes, sir.

The Court: I mean, is that the reason?

The Witness: That is the reason.

The Court: That is what you attribute it to?

The Witness: Yes, sir.

The Court: All right. But it isn't any more successful now than it was before; is that your position?

The Witness: I think that is, sir.

The Court: It is. All right.

Mr. Neave: That is all.

The Court: We will have a short recess.

Mr. Neave: May it please your Honor, that concludes the witnesses that the plaintiff has in this case. I would like to offer now a copy of the file history of the McAdam patent No. 2,219,393 as Plaintiff's Exhibit—

The Court: No. 112?

Mr. Neave: —112.

The Court: Yes. I have been thinking over Exhibit 111, and I think I will reverse my ruling and admit Exhibit 111.

Mr. Neave: Very well, sir.

(The documents referred to were marked as Plaintiff's Exhibits Nos. 111 and 112, and were received in evidence.) [1336]

[Note: Plaintiff's Exhibits Nos. 111 and 112 will be found in the Book of Exhibits at pages 1317 and 1324.]

Mr. Neave: And I offer a book the patents cited in the McAdam file history as Plaintiff's Exhibit 113.

The Court: That is the same book of prior art, which you made available?

Mr. Neave: No, sir. These are the patents that were cited by the Patent Office during the prosecution of the McAdam patent, and they are all different.

The Court: All right.

Mr. Lewis Lyon: None of those are pleaded, however?

Mr. Neave: That is correct.

Mr. Lewis Lyon: They are in there to show the state of the art?

Mr. Neave: Yes.

(The document referred to was marked as Plaintiff's Exhibit No. 113, and was received in evidence.)

[Note: Plaintiff's Exhibit No. 113 will be found in the Book of Exhibits at page 1441.]

The Court: I would like to ask the last witness another question.

JOSEPH REDDINGTON CHAMBERLAIN,

recalled by the Court, having been previously sworn, testified further as follows:

By the Court:

Q. Mr. Chamberlain, in connection with the installation of the water defrosting method, have you installed any water defrosting method in any larger plant than what you call a small plant? I don't know what you mean by "small" or [1337] "large." What is the largest room that you have refrigerated by one of your machines with water defrosting?

A. The largest one that I am aware of, your Honor, is a room about this size, sold to the armed forces under specifications for water defrosting. That was exclusive of the numbers that I mentioned that we had sold.

The Court: Oh, that was in addition to the 11 per cent—
A. Yes, sir.

The Court: —that you had sold? A. Yes, sir.

Q. Where was that? A. To the armed forces.

Q. Where was it installed?

A. Oh, there is one installation at Camp Devens near Boston that I have personally seen, and there is another very close to Boston. I haven't seen that one.

Q. What kind of a machine did you put in? What type? What is your number on it, or do you have a number? Was it a special built machine?

A. No, sir, it was the same apparatus that we use for brine defrosting, the same headers and pan.

Q. Was it your F. B. 1400?

A. No, it wasn't. It was a later model, what is called our "IWB" meaning—or, not "IWB" but "IDB," mean-

(Testimony of Joseph Reddington Chamberlain)

ing industrial dry coil unit, which is the modern edition of that. [1338]

Q. How many feet of refrigerating coil?

A. The IDB comes in about four sizes.

Q. Well, which one in this room that we are talking about?

A. Oh, there were a couple or three in that room.

Q. Three of what size?

A. They were 126, which was about the size of this No. 1400.

Q. About 1400 feet of refrigerating coil?

A. Yes, sir.

Q. With the aluminum fins?

A. No sir, bare coil.

Q. Bare coil? A. Yes, sir.

Q. No fins? A. No fins.

Q. Are your units installed with fins?

A. Sometimes, and sometimes bare. It is a matter of economics in our particular shop. Pipe is cheap. It calls for a lot of weight, but it is a matter of balancing one thing against the other, to come out with the most economical job.

Q. Do you know how you happened to install this particular type of equipment in the Camp Devens job, and in the other job?

A. It was specified, sir. [1339]

Q. It was specified by the Army? A. Yes, sir.

Q. Did you have to do with the design and manufacture of the portable units that are mentioned in the stipulation here, that were manufactured by York for the Army? A. For the Army?

(Testimony of Joseph Reddington Chamberlain)

Q. Yes.

A. No, sir, I did not have anything specific to do with it. I was in a supervisory capacity, however, when they were built, and I was aware of what was being done.

Q. Well, do you know how you happened to build the water defrosting type for the Army?

A. The Army requested it.

Q. They requested it? A. Yes.

Q. Well, I have been around a little bit, and I know the Army just doesn't request things out of the air. Somebody gives them a sales talk, and they make inquiries, and they have purchasing agents who have millions of catalogues and information, and so forth.

A. That is correct.

Q. Was there any discussion between you and the Army— A. You mean with me personally?

Q. Yes. A. Not with me. [1340]

Q. Or with your department?

A. With my department there was discussion. These units illustrated in one of the defendant's exhibits, that picture—

Q. Yes. A. —of the plug type unit—

Q. Yes.

A. —had been established, I don't know whether it was with the Marine Corps or the Quartermaster, but they both used them and they had standardized on that type of unit, and in order to secure them a great many people, that is, manufacturing concerns, built them, we being among them. We built an edition of that particular type of apparatus, you might say.

(Testimony of Joseph Reddington Chamberlain)

Q. In view of your experience, do you think that your dry gas or your gas method would have been better?

A. In that particular installation I would say that the water would probably be the most satisfactory means.

Q. By Mr. Neave: Which installation do you mean?

A. I mean the Marine Corps or Quartermaster.

Q. By the Court: The one that is illustrated by one of the defendant's exhibits?

A. That particular unit, however, was soon found to be inadequate and was replaced by an entirely different type of apparatus. It was not sufficiently maneuverable with the [1341] speed at which the Army moved. The theory was that they could set up these cold stores back about the second echelon from the line, and as the forces moved they could move the refrigerating plant. The idea was that they had a unit they plugged into— The unit was complete and had the low side on one side of the plug and the high side on the other. However, it was soon found that refrigerated trucks which used air condensers and plate evaporators were better for their use, and in that way they could move this food as the Armed Forces advanced. We didn't build too many of these ourselves.

The Court: I haven't any further questions.

Q. By Mr. Neave: Do you know whether or not the York Corporation initiated the water defrosting system with the Army and the Navy?

A. I do not know.

Mr. Neave: That is all.

The Court: Any cross?

Mr. Lewis Lyon: No cross.

The Court: Very well. That is all.

(Witness excused.)

Mr. Neave: I would like to offer in evidence as Plaintiff's Exhibit 114 a photostatic copy of the notice of infringement which was received by the York Corporation from Mr. Lyon, and which is dated January 5, 1944. [1342]

The Court: Admitted.

(The document referred to was marked as Plaintiff's Exhibit No. 114, and was received in evidence.)

[Note: Plaintiff's Exhibit No. 114 will be found in the Book of Exhibits at page 1481.]

Mr. Neave: At this time I would like to move to amend our complaint to add the following:

"Defendant is barred from the relief sought in the McAdam patent because it has misused the patent in an effort to control competition on unpatented devices."

This will form the basis of argument on law that we will make.

The Court: Where do you want to add that?

Mr. Neave: That can be added anywhere in the complaint, your Honor.

The Court: Well, it is your complaint.

Mr. Neave: I haven't got it before me. May I see the court's copy?

(The document referred to was handed to counsel.)

Mr. Neave: As Paragraph IX.

The Court: That motion is made to conform with the proof?

Mr. Neave: That is true.

Mr. Lewis Lyon: What proof?

The Court: The motion is denied.

Mr. Neave: The proof—

The Court: Go ahead. [1343]

Mr. Neave: The proof has come to light here, your Honor, in the testimony of Mr. Jarvis. He testified that the defendant company sold only the unit. He also testified that they did not install the unit, and that they did not sell the conduits from the unit to the valve and connecting the unit with the outside.

Mr. Doble has testified that all of the parts of the patent combination were in and of themselves old, and your Honor will recall his “but”, his “but” being that they were used—

The Court: In combination.

Mr. Neave: —in combination. He made it very clear that the invention of the patent was the combination. It is, therefore clear that the defendant company is not selling the patented combination.

Mr. Jarvis also testified that he, his company, never sued any manufacturer who purchased the devices from his company. He also testified that he never sued the York Company when they purchased these unpatented devices from his company. He further testified that he had sued other companies who had sold devices, that is, these unpatented devices that were purchased from somebody else, and this suit contains a counter-claim against this plaintiff for sale of a unit which was not bought from the defendant company.

Therefore, your Honor, we are going to make the legal [1344] argument from that proof that the plaintiff has misused the patent, in that it is trying to force people to purchase from it the unpatented devices, that is, the devices which are less than the entire combination.

That is the argument, and that law has been laid down in the case of *Mercoide v. Mid-Continent* in 360 U. S.—

Mr. O'Hearn: 320.

Mr. Neave: —320 U. S. 661, and I think at 660. There are two cases, your Honor.

I renew my motion.

Mr. Lewis Lyon: I oppose the motion on the same ground. The evidence clearly shows that perhaps we are selling less than we are entitled to under the combination and giving a license to use the rest of it. We certainly don't control the sale of pipes or valves, or anything like that, and we let them use that. But there is clearly no misuse of the patent under such circumstances. We are not requiring anybody to buy unpatented devices from us, and we are selling them for use with directions how to use them.

Mr. Neave: We will show your Honor that the facts in this case are almost identical with the facts in the *Mercoide* case, which, of course, is a question of argument.

Mr. Lewis Lyon: They are not. They are not even comparable.

The Court: Let me see the *Mercoide* case. 316, is it? [1345]

Mr. Neave: I have a copy of it.

The Court: I will have the bailiff get my copy.

Mr. Neave: 360 U. S.

The Court: 360?

Mr. Neave: No. Now, let me see. I only have the citation in this patent quarterly, your Honor, with me.

The Court: Doesn't it give the Supreme Court citation?

Mr. Neave: No, I don't think it does. This comes out before the Supreme Court.

The Court: You gave the U. S. citation?

Mr. Neave: I did, but I think I must be wrong. My note says "360," but I don't think we are up that high.

The Court: I think you cited that here in your pre-trial memorandum.

Mr. Neave: I think it is cited on another point.

The Court: Yes. 320 U. S., Mr. Bailiff.

Mr. Charles Lyon: 320 U. S., 661.

Mr. Neave: The portion contained in that brief, your Honor, of course, is on a different point.

The Court: Yes, I understand. [1346]

Mr. Neave: I also want to bring to your Honor's attention that all of the claims in suit in the patent start out with the words "in combination with a refrigerated space."

Now Mr. Doble testified very clearly that that was an important element of the claim, because that imparted into the claim the temperatures that were a part of McAdam's invention.

The defendant here does not sell the refrigerated space. He does not use it either. In order for the patented device to be the patented device it has got to have all of the elements of the claim.

Mr. Lewis Lyon: You stipulated to such a use by your very stipulation.

Mr. Neave: No, sir. It doesn't stipulate that we sold the space. It has got nothing to do with what you do.

The Court: I do not think the case is similar.

Mr. Neave: May I point out, your Honor, portions of this?

The Court: All right.

Mr. Neave: In the third paragraph of Mr. Justice Douglas' opinion, he says:

"The patent is a combination or system patent, covering a domestic heating system which comprises three main elements—a motor-driven stoker for feeding fuel to the combustion chamber of a furnace, [1347] a room thermostat for controlling the feeding of fuel, and a combustion stoker switch to prevent extinguishment of the fire."

In other words, there are three elements. There is the stoker, the thermostat and the switch.

Now skipping to the next paragraph:

"Mercoid, like Mid-Continent and Minneapolis-Honeywell, does not sell or install the Cross heating system. But the Circuit Court of Appeals found that Mercoid manufactured and sold combustion stoker switches for use in the Cross combination patent."

In other words, they sold one of these elements. This suit was brought, by the way, for contributory infringement, that is, for selling less than the entire combination.

Mr. Lewis Lyon: That is the distinction.

Mr. Neave: Then in the next paragraph there is some discussion of this and in the following paragraph, about three quarters of the way down the page, it says:

"The method by which the monopoly is sought to be extended is immaterial. (Citing case) The patent is a privilege. But it is a privilege which is conditioned by a public purpose."

I quoted that in my brief.

The following paragraph begins:

“The instant case is a graphic illustration of [1348] the evils of an expansion of the patent monopoly by private engagements. The patent in question embraces furnace assemblies which neither the patentee nor the licensee makes or vends.”

Now that is exactly the situation here, that the patentee, the owner of the patent, doesn't make or vend the entire combination.

The Court: Does anybody?

Mr. Neave: It is perfectly possible that somebody may. He ought to sue a user then, your Honor.

The Court: They use steel in a great many patented commodities, do they not?

Mr. Neave: That is true.

The Court: This little clip machine, for instance.

Mr. Neave: That is true.

The Court: Do they make the steel? Do they dig the ore out of the ground?

Mr. Neave: No, but it depends on what the invention is. The invention here is the combination of all of the elements, and Mr. Doble has said that in no uncertain terms.

The Court: But the point in this case was, as they pointed out over here, “The owner of a patent may not employ it to secure a limited monopoly on an unpatented material used in applying the invention.”

Mr. Neave: That is exactly the situation here. [1349]

The Court: Now he isn't trying to get here—that is, the evidence doesn't show at least so far—that he is trying to get a limited monopoly on a stop-and-waste valve.

Mr. Neave: Yes, sir, that is exactly what it shows.

The Court: Not according to my understanding of the claims of the patent and the argument of the patentee's counsel. So far as the stop-and-waste valve is concerned, you do not have to have to have it. It can be manually operated, as they stated, by turning one on and turning the other off.

Mr. Neave: That is right. Any valve will do it.

The Court: Any valve will.

Mr. Neave: That is right. And the claim calls for a valve.

The Court: But they are trying to get a limited monopoly on all the stop-and-waste valves, is that it?

Mr. Neave: No, that isn't necessary, your Honor. What they are trying to do is to get people to buy from them something that is unpatented, by the leverage of their patent. The thing that they sell is not the entire combination. They sell only a part of it, just as in this case the patent owner only sold the switch. He didn't sell the whole combination. By bringing suit against people who don't buy from them this unpatented combination and by not bringing suit against those that do buy from them the unpatented combination they are using their patent as a lever. They are holding out and saying to [1350] their purchasers of this unpatented unit, "If you buy this from me you will get an implied license for

every unit that you buy from me and you can use it in this combination.” As has just been said, they give instructions so that you can do it. So that the man who buys from them will have the benefit of an implied license. That is a commercial advantage that they hold out: “We have got the patent, and if you buy this unpatented combination from us you will get an implied license. If you don’t buy it from us I am going to sue you.”

The Court: I am going to sue you if you use it.

Mr. Neave: If you make it and sell it, or if you sell this unpatented combination. *

The Court: If you make it and sell it.

Mr. Neave: That is right.

The Court: I thought that is what a patent is for, to give a man a right to sue people who make the thing that he had patented.

Mr. Neave: But this is not the thing he patented.

The Court: The combination is.

Mr. Neave: Because the combination that he patented includes all of these elements, and he doesn’t sell all of the elements. That is the whole point that I am making. I am not trying to persuade your Honor here as to the applicability as to the rule of law; I am just saying I ought to be allowed to make my amendment in view of this evidence. [1351]

The Court: I do not think so, not at this late stage of the game. The motion is denied.

Mr. Neave: Your Honor, it is the only time that I could make it. We didn’t have the evidence before us

before, and how can I bring up this point in the court of appeals if your Honor will not let me make it? I am making this motion at the time when the plaintiff—

The Court: You are making this motion now and after a trial of seven days. The case has been set for trial for some time. There was a great urgency to get the case tried and I set another case aside to try this case so that we could proceed to trial and have these rights litigated.

Now at the conclusion of your case, at the conclusion of both sides except for any rebuttal that might be offered, there is a warning to the other side for the first time that you are going to claim misuse of the patent and invalidity on that ground or whatever consequence flows from that.

Mr. Neave: That is right. -

The Court: So in the exercise of the discretion which is certainly allowed in the matter of allowing amendments to pleadings, I should say that that would be an abuse of discretion now, particularly in view of the fact that you have been in possession of the information upon which you now rely ever since the close of the defendant's testimony which was put on first in this case. [1352]

Mr. Neave: That is true, your Honor.

The Court: So you could have made your motion, which would have been more timely than now. It is now untimely, in the first place, and on that ground I deny it, and on the additional ground that I do not believe the evidence shows, and your motion is made to conform the pleadings to the proof.

Mr. Neave: That is correct.

The Court: So your motion is denied.

Mr. Neave: May I point out two matters to your Honor? One is that the defendant here has not pleaded surprise, has not said that he is surprised by this motion.

The Court: I haven't given him a chance to talk yet. I do not know whether he is or not.

Mr. Neave: Secondly, that the motion is being made now before the defendant's rebuttal case so that it will have plenty of time to meet any such issue.

The Court: Plenty of time to prepare on the matter?

Mr. Neave: Yes.

The Court: Do you mean between now and 2:00 o'clock?

Mr. Neave: Certainly.

The Court: When all of the parties have been warned at the commencement of this case that I had to finish it this week, that I cannot displace the criminal calendar which I must begin to try next Monday?

Mr. Neave: Well, your Honor, I think that litigants, [1353] particularly in a situation like this, where counsel are very experienced on the other side, know what is going on when questions of the character that I asked of the witness Jarvis were answered, so that I do not think that there is any surprise, and it seems to me that with the vice president and manager of the corporation here they could put on plenty of evidence at short notice if they wanted to. I don't think that there is any surprise.

The Court: I don't know what evidence it is. In any event, you can have the matter reviewed. You can take it up as one of your grounds to the circuit court, who will examine my judicial discretion and see how badly it was abused, if it was.

In any event, the motion is denied.

Mr. Neave: I have an exception automatically, I assume.

The Court: Automatically, and if you haven't one automatically you have one now anyway.

Mr. Neave: Thank you.

The plaintiff rests.

Mr. Lewis Lyon: Do you want the rebuttal to start now at 4 minutes to 12:00, your Honor?

The Court: How long will you be? Will you finish this afternoon?

Mr. Lewis Lyon: I will finish this afternoon; yes, your Honor. [1354]

The Court: All right. Then we will figure on argument tomorrow, unless counsel has surrebuttal or redirect examination, or whatever you might call it.

Mr. Neave: We don't know yet.

The Court: We will finish all of the testimony this afternoon and figure on arguing the case tomorrow.

Mr. Neave: Very well, your Honor.

The Court: 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m. of the same date.) [1355]

Los Angeles, California, Thursday, September 26, 1946,
2:00 P. M.

The Court: Mr. Lyon?

Mr. Lewis Lyon: Your Honor, I would like to first get into the record the dimensions of this room. As I stepped them off, it is somewhere around 45 to 70.

The Court: You can get them accurately from the custodian of the buliding.

You know where his office is, Mr. Bailiff. Will you go down and ask him if he has the plans to show the accurate dimensions?

Mr. Lyon: Thank you. While we are waiting for that, your Honor, we will call Mr. Wilde.

CARL E. WILDE,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Your name, sir?

The Witness: Carl E. Wilde.

The Clerk: And your address?

The Witness: 10009 Orange Avenue, South Gate.

The Clerk: Take the stand.

Mr. Neave: What town was that?

The Court: South Gate. South Gate, California. [1357]

By Mr. Lewis Lyon:

Q. What is your occupation now, Mr. Wilde?

A. Public accountant.

(Testimony of Carl E. Wilde)

Q. What was your occupation in the latter part of 1939?

A. I was sales manager, selling commercial refrigeration and air conditioning in San Diego in the latter part of '39.

Q. Were you at any time connected with the R. W. Weidlein Company?

A. Yes, sir, from May, 1941, until April, 1943.

Q. Did you at any time occupy the position of co-receiver for the R. W. Weidlein Company?

A. Yes, sir.

Q. When was that?

A. That was between May and the latter part of September, '41.

Q. What was the business of the R. W. Weidlein Company?

A. Retailing commercial refrigeration.

Q. Who was the other co-receiver for the R. W. Weidlein Company at that time?

A. Mr. R. W. Weidlein himself.

Q. Any one else?

A. No, sir.

Q. Are you acquainted with Mr. W. C. Hulse?

A. Yes, sir.

Q. Where did you meet Mr. Hulse? [1358]

A. I met him first at the Weidlein Company.

Q. Did you ever have any conversation with Mr. Hulse while you were receiver for the Weidlein Company with respect to the subject of water defrosting of Recold coils?

A. Yes, sir.

Q. Who else was present?

A. I don't know as anybody in particular was present, that I can remember of, at the time, because we had

(Testimony of Carl E. Wilde)

several discussions about that; in fact, a good many of them.

Q. Did Mr. Hulse have any duties with respect to the Weidlein Company while it was in receivership?

A. I don't just get your question there.

Q. Was he a representative of any company, any creditor company, of the R. W. Weidlein Company, while it was in receivership?

A. Yes, he was the representative for the Koch Case Company, and he was on the creditors' committee.

Q. Can you fix more accurately the date of this conversation with Mr. Hulse concerning the subject of water defrosting?

A. Not the exact date, but it was the latter part of the year of '41, when I was there full time. At the time I was co-receiver, I was there only just occasionally to sign checks with Mr. Weidlein and watch that the salesmen didn't receive too many advances. Approximately the latter part of [1359] September I was there in full charge as manager, and in those times I had many discussions with him, because I was there all day long. [1360]

The Court: The Treasury Department, Procurement Division, drawing of United States Post Office and Court House, second floor, drawing No. AS-5, showing courtroom No. 3—I do not think it gives the dimensions here. It shows 2120 square feet but it does not give the height.

Mr. Lewis Lyon: Are the dimensions given on that drawing, the length and the width of the room?

The Court: No, it doesn't seem to give it. I do not see any scale here. They must have another map down there with a scale drawing.

Mr. Bailiff, will you ask them?

(Testimony of Carl E. Wilde)

The Bailiff: Yes, your Honor.

The Court: Also something which will show the height of the room.

Go ahead. This is a conversation with Hulse in 1941?

The Witness: That is correct.

By Mr. Lewis Lyon:

Q. Can you state what Mr. Hulse said to you concerning water defrosting at that conversation, Mr. Wilde?

A. Yes, sir.

Mr. Neave: Just a minute. What is the purpose of this testimony, Mr. Lyon?

Mr. Lyon: Impeachment.

Mr. Neave: Is that the only purpose?

Mr. Lyon: No. The other is to show the fact of an [1361] adandoned experiment.

Mr. Neave: I object to anything other than impeachment, your Honor, because otherwise it is hearsay testimony. If Mr. Lyon is trying to prove a fact other than the conversation through what somebody else said it is hearsay. If he is just trying to prove something that was said to impeach a witness of mine, that is proper.

The Court: I think the testimony is admissible. No objection was made as to the form of the question.

Mr. Neave: I don't object to the form of the question. I would object to it as a whole if it were for the purpose of anything other than impeachment of the witness, as then it would be hearsay.

Mr. Charles Lyon: On that point, your Honor, I have some authorities I would like to quote to the court.

(Testimony of Carl E. Wilde)

The Ninth Circuit of Appeals, in *Lindblom v. Rocks*, 146 Fed. 660, at 664, stated:

“In brief, the whole proof of the purpose of the defendant in error to leave the property without the intention to return consists in the words which she is said to have uttered to Tronsen and the fact that she went away from Nome. It is too plain to require discussion that where a defendant in such an action as this, relies upon the words of the former possessor to show an intention to abandon, the burden of [1362] proof is upon him to prove that the words were spoken, and that in the absence of facts sufficient to shift the burden of proof, it must always rest upon him who asserts the abandonment.”

That case merely holds of course by implication that you can prove the declarations.

The California law is quite clear also. In *Willson v. Asaph Cleveland*, 30 Cal. 192 at 203, the court stated:

“Upon a question of abandonment, as on a question of fraud, a wide range should be allowed, for it is generally only from facts and circumstances that the truth is to be discovered, and both parties should be allowed to prove any facts or circumstance from which any aid for the solution of the question can be derived.”

In *Turner v. Markham*, 155 Cal. 562 at 572, the court said:

“Was the agreement abandoned? Abandonment is governed by intent, and the intention to abandon must be established by declaration or by conduct.”

(Testimony of Carl E. Wilde)

In 31 Corpus Juris Secundum, Evidence, Section 256, we find the following statement:

“Where declarant’s intent or intention is relevant, his declarations disclosing such intent or intention are admissible.”

I don’t believe I need read any more of these, but we [1363] have the case of *Stromerson v. Averill*, 38 Cal. App. (2d), 118, at 125 and 126; *O’Dea v. Hibernia Savings and Loan Society*, 119 Cal. App., 622 at 624.

It seems to me quite clear, your Honor, that when you are trying to prove the intention that a person had when they performed an act, his declarations as to why he performed the act or with what intention he performed the act are clearly admissible, it not being hearsay in the first place and, in the second place, if it is it is a well established exception to the rule.

Mr. Neave: Your Honor, I don’t think that those references are at all pertinent here. The intention of Mr. Hulse doesn’t enter into it at all. Mr. Hulse was a man who put in the installation. At the time he left the company he was working with, the installation belonged to somebody else. If it was abandoned it was abandoned by somebody else and not by Mr. Hulse or the company he was working for.

Now what this witness may have to say with respect to what somebody else told him and then try to use that to prove whether or not this thing was an abandoned experiment or worked satisfactorily or didn’t work satisfactorily, is just pure hearsay. If it is purely for the purpose of impeachment—

(Testimony of Carl E. Wilde)

The Court: I think the testimony is admissible. I think it is admissible for impeachment purposes, and if it is [1364] admissible for impeachment purposes it is admissible to prove the thing that was sought to be proved by the testimony which is sought to be impeached.

Mr. Neave: I have to disagree with your Honor on that because then it is trying to prove the fact, like the fact of operation, by hearsay testimony.

Now the testimony that Mr. Hulse gave was of his own direct knowledge. If it goes beyond impeachment then it is pure hearsay.

The Court: It is impeachment and rebuttal.

Mr. Neave: It may be rebuttal, but it is improper rebuttal. That is, it is improper testimony because it is hearsay testimony as far as any proof tending to show what happened to that operation.

The Court: We will argue as to what has been proved or hasn't been proved later. In the meantime, your objection is overruled.

Mr. Neave: May I have an exception?

The Court: Exception noted.

Mr. Lewis Lyon: Will you read the question.

(The question referred to was read by the reporter, as follows:

“Q. Can you state what Mr. Hulse said to you concerning water defrosting at that conversation, Mr. Wilde?”)

The Witness: Yes. At this time Mr. Hulse, being on the [1365] creditors' committee, was helping or trying help make sales for the Weidlein Company, and we had a particular job going through this with some chipped

(Testimony of Carl E. Wilde)

beef concern in which we had taken back a small water defrost freezer, and we were in preparation of plans to install a larger plant, and Mr. Hulse, trying to convince me to change my mind about a water defrost coil and put some other type of defroster in there—

The Court: What he said, not the effect of his conversation.

The Witness: He said this to me.

The Court: Said what?

The Witness: Not to put in the water defrost coil because they were not satisfactory, because he himself had experimented with it. He had put the first job in when he was in Portland and it never worked satisfactorily, and he had had the best engineers in the world and still it wouldn't produce the results.

However, I was the manager of the place, could do as I wished, and I determined that a defrost coil would go in because it was satisfactory from my past experience that it was.

Mr. Lewis Lyon: That is all. [1366]

Mr. Lewis Lyon: That is all.

The Court: Cross-examine.

Cross Examination

By Mr. Neave:

Q. Mr. Wilde, just what was the date of this conversation? A. Sometime the latter part of 1941.

Q. In what month was it?

A. Oh, it could be October or November, along in there.

(Testimony of Carl E. Wilde)

Q. Which month was it?

A. Well, now, I couldn't state the exact date. I said the latter part of 1941. I could dig up the old records and see when this job was being installed and produce the approximate date.

Q. You haven't dug up those records?

A. Well, I haven't. The Weidlein Company is extinct today, has been for a couple of years.

Q. Now, what was this unit that wasn't operating properly? What make was it?

A. The unit that he put in. Now, I don't know what unit it was, but he had put in the unit, and I believe he said he was working for Carrier at the time.

Q. The unit you said was all right, was that a Carrier unit? A. No, sir, that was a Recold. [1367]

Q. I can't hear you.

A. That was a Recold unit.

Q. That was the unit that wasn't operating satisfactorily? A. No, sir, that unit worked swell.

Q. Worked well? A. Yes, sir.

Q. Mr. Wilde, I thought I understood you to say that you were talking about a unit that you had taken out that didn't work satisfactorily.

A. That isn't what I said. I said we took out a unit because the man's business had increased and he needed a larger box.

Q. What unit were you thinking of putting in in the larger installation? A. Recold coil.

Mr. Neave: I see. That is all.

Mr. Lewis Lyon: That is all.

The Court: Step down. The next witness.

Mr. Lewis Lyon: Mr. Niel Dahl. [1368]

NIEL DAHL,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: State your name, please.

The Witness: Niel Dahl.

The Clerk: Is that N-e-a-l?

The Witness: N-i-e-l.

The Clerk: And your address?

The Witness: 725 Magnolia Avenue, Long Beach.

The Clerk: Take the stand.

By Mr. Lewis Lyon:

Q. Were you at any time employed by the Electrical Products, Consolidated, at Seattle, Mr. Dahl?

A. I was.

Q. What was your capacity with that company?

A. I was manager and chief engineer.

Q. During what period of time?

A. From January 1, 1936, until September of 1937.

Q. Were you at any later date employed by the Electrical Products Corporation? A. No, sir.

Q. Were you at any time during such employment acquainted with Mr. W. C. Hulse?

A. Yes. I hired him and put him to work for the [1369] Electrical Products Corporation.

Q. When did you hire Mr. Hulse?

A. Approximately the first of April, 1936.

Q. At what time did Mr. Hulse leave the employment of Electrical Products Corporation?

A. Approximately March, of 1937.

(Testimony of Niel Dahl)

Q. At what time, to your knowledge, did Mr. Hulse leave the employment of Electrical Products Corporation at its Portland division?

A. Approximately two weeks previous.

Q. Was Mr. Hulse responsible to you? Was he subordinate to you in that organization?

A. That is correct.

Q. Had Mr. Hulse, prior to the time of your employment of him for Electrical Products Corporation, had any experience in refrigeration, to your knowledge?

A. Not to my knowledge, in commercial refrigeration. He may have had some nominal experience with household boxes.

Q. Were you the officer of the Electrical Products Consolidated that set up the Portland office of that concern?

A. I was not an officer of the corporation. I was the manager of the air-conditioning-refrigeration division, but I was responsible for and in active charge of the setting up of the Portland air-conditioning-refrigeration organization.

Q. Was that Portland branch discontinued during the year [1370] 1937? A. It was.

Q. Why?

A. Many reasons. I had determined to liquidate the business due to large losses that occurred on many jobs. Our service, due to lack of sufficient trained personnel, was becoming excessive. For many other reasons it was determined to liquidate the business and the Portland office was closed approximately August 1, of 1937.

(Testimony of Niel Dahl)

Q. Did you keep track of what was going on through the Portland office during the time that it was maintained?

A. Very definitely.

Q. Were you responsible to the corporation for the operation of that branch? A. I was.

Q. During the operation of that branch, were you acquainted with the installation made by Electrical Products Corporation for Trullinger & Eustice at Yamhill, Oregon? A. I was.

Q. Did you visit that plant? A. I did.

Q. Were you familiar during that time with the attempts made to defrost the system through the use of water?

A. I was. At a later—I was not familiar with it to start with, because I was on an extended trip in Montana, [1371] but I soon became aware of it upon my return from that trip.

Q. How did you become aware of it?

A. I periodically visited the Portland office, as well as several other offices, and by monthly reports from my accounting office, an analysis of the service costs, job costs, and so forth. That and several other jobs were brought to my attention as having run over and actually showed a loss.

Q. A loss occasioned by what, Mr. Dahl?

A. Primarily extensive service.

The Court: You mean, after installation?

The Witness: Yes, sir.

(Testimony of Niel Dahl)

Q. By Mr. Lewis Lyon: Did that continue throughout Electrical Products Corporation's servicing—I mean, knowledge of the operation of that structure?

A. Yes, it continued for several months; just how far, I do not recall.

Q. Just how serious were the service charges against that Trullinger & Eustice operation?

A. Well, I do know that we not only lost our anticipated profit, but actually the job cost us money.

Q. Do you know what kind of a unit—

The Court: What was wrong with it? Anything?

The Witness: Yes, sir.

The Court: Well, what was it?

The Witness: Continual defrosting problems. [1372]

The Court: Continual defrosting—

The Witness: Yes, sir, continual problems of defrosting.

The Court: Was that after water defrosting was installed, or before?

The Witness: Before and after.

The Court: Do you know how long the gas defrosting was in?

The Witness: I cannot place the date. I would judge for two—possibly two months.

The Court: And then it was taken out and the water put in?

The Witness: Yes, sir.

The Court: After that you still had trouble—

The Witness: Yes, sir.

The Court: —with the water defrosting?

The Witness: Yes, sir.

The Court: What trouble?

(Testimony of Niel Dahl)

The Witness: Well, the trouble basically was that the coil, due to the distribution system of water, and the construction of the coil would not satisfactorily de-ice. There was ice even though the top of the coil was free of ice and visual inspection would indicate that it was defrosted, ice in large blocks would form on the lower side of the coil, where the water could not impinge upon it in the form of icicles, heavy glazed ice. [1373]

The Court: What did you do about it?

The Witness: There was not much to do.

The Court: I mean, did you leave the water on longer or—

The Witness: That would be one possibility.

The Court: Well, did you do that?

The Witness: I did not, no, sir.

The Court: I mean, did you order that done, or have it done, or see that it was done?

The Witness: No, sir.

The Court: Or did somebody under you do it or do you know whether or not it was done?

The Witness: They had experimented with this job for some period of time before I became aware of the change.

The Court: Yes.

The Witness: This change was not made on my authority. The Portland office had a certain amount of authority of its own to proceed. I was only there intermittently. I could not control the details on each and every job, but this attempt with water defrost was not an authorized proposition by myself. The problems and details were worked out by Mr. Hulse and Mr. Postlewaite, my engineer at the Portland office. [1374]

(Testimony of Niel Dahl)

By Mr. Lewis Lyon:

Q. At that time Electrical Products Corporation was acting as a representative of what concern?

A. Carrier Corporation.

Q. And was any report ever made to the Carrier Corporation of this experiment? A. There was not.

Q. Was the experiment ever repeated by Electrical Products Corporation to your knowledge?

A. It was not.

Q. Was the experiment abandoned by Electrical Products Corporation or not?

Mr. Neave: I object to the characterization that it was an experiment, your Honor.

Mr. Lewis Lyon: The witness so referred to it, your Honor.

The Court: According to your brief, that is what I have to decide.

Mr. Lewis Lyon: That is right. I am using the witness' word—I will change the form of the question.

Q. Was any attempt ever made by Electrical Products Corporation, to your knowledge, to produce any other water defrost system? A. Not to my knowledge.

Q. You would have known it if it had been done, would [1375] you not, while you were there?

A. Within the Electrical Products organization covering some several states; yes.

The Court: Was the idea of using water to defrost abandoned?

The Witness: Very definitely in this respect, that it was never accepted.

There are two methods that were approved, both by the Carrier Corporation and the other offices that were

(Testimony of Niel Dahl)

schooled in by myself, and according to the Carrier manual, and that was either hot gas defrosting or warm air defrosting. We had never considered up to the advent of this actual installation—I had never considered, I should say—the use of water.

By Mr. Lewis Lyon:

Q. How long at that time had you been in the refrigeration business? A. Since 1927.

Q. Do you recall that the unit that was installed in the Yamhill plant was a 15 Q-2 floor model cold diffuser of the Carrier Corporation? A. It was.

Mr. Neave: Objected to as leading and suggestive.

The Court: Overruled.

The Witness: It was a 15 Q-2 model. [1376]

By Mr. Lewis Lyon:

Q. What were the recommendations of the Carrier Corporation as to the use of that type of cold diffuser?

A. 15 Q models of the various sizes were not recommended for below freezing installations.

Q. Do you know, Mr. Dahl, why that 15 Q-2 cold diffuser was placed outside of the locker room?

A. Yes, for very definite engineering reasons.

Q. What were they?

A. Standard procedure in those similar installations was the usage of hot gas defrosting. Hot gas defrosting was an answer but it was not perfect. One of the big problems was the incomplete defrosting of a deep coil.

The time element in defrosting using the reverse cycle—

The Court: That is, hot gas?

The Witness: Hot gas, in which you pump the heat into the coil instead of taking it out, is such that the water drips very slowly from the coil as it defrosts.

(Testimony of Niel Dahl)

Now water as it drips over heavy frost tends to form glazed ice. Glazed ice in itself, or hard ice, is an insulator. It melts quite slowly.

The water dripping down from the bottom of the coil, that is, the melted frost dripping down from the bottom of the coil, would tend to build up icicles and blocks of ice between the fins. If it came in contact with air below freezing [1377] at any time, just like icicles are formed at the edge or eaves of a roof during a thaw or just after a thaw, therefore to make hot gases satisfactory as possible with all its other drawbacks, our standard procedure in many cases where physically possible was to locate the unit within a warmer space, and that is what was not only done on this job but was submitted on other proposals by various offices at various times.

By Mr. Lewis Lyon:

Q. Did you ever have any conversation, Mr. Dahl, with Mr. W. C. Hulse about testifying in this case?

A. Pertaining to this case but not—yes, as to testifying.

Q. Where did that conversation take place?

A. In San Francisco. That is on the telephone. I was in San Francisco, he was in Los Angeles.

Q. Did Mr. Hulse call you or did you call him?

A. Mr. Hulse called me.

Q. When was that, do you recall?

A. I would judge that it was in August of 1945.

Q. Can you tell me what was said by Mr. Hulse and yourself at that time?

Mr. Neave: Your Honor, I object on two grounds, the ground which I have previously raised, which I assume your Honor will rule upon in the same way, and

(Testimony of Niel Dahl)

upon the second [1378] ground that, as I understand it, in order to impeach a witness you have to put the question on cross examination as to whether or not he had had a conversation and what was said at that time if you are going to impeach him in that manner.

Now that foundation was laid with respect to Mr. Wilde and with respect to I believe Mr. Jarvis, but not this witness.

The Court: I thought he laid it here, whether or not he had a conversation, and he stated he had a conversation with Hulse in August 1945, when he called him on the telephone.

Mr. Neave: I do not recall that, your Honor.

The Court: He stated that just now.

Mr. Neave: Yes, he did so testify, but what I am saying—

The Court: You mean he asked Mr. Hulse on the witness stand whether or not in August 1945 whether he did?

Mr. Lewis Lyon: Pardon me, your Honor, for interrupting. This is not for the purpose of impeachment.

The Court: You asked Hulse whether he had the conversation?

Mr. Lewis Lyon: I asked him whether or not he knew this man. That is as far as I went. It was not for impeachment.

The Court: This is rebuttal.

Mr. Lewis Lyon: This is rebuttal and for the purpose of showing bias and interest and other factors.

The Court: Objection overruled.

By the way, the court room is 53 feet long, 40 feet wide, [1379] 25 feet and 5 inches high.

(Testimony of Niel Dahl)

Mr. Lewis Lyon: Thank you, your Honor.

The Court: Read the question.

(The question referred to was read by the reporter, as follows:

“Q. Can you tell me what was said by Mr. Hulse and yourself at that time?”)

The Witness: I can give you the gist of the conversation. Being long-distance, I was quite surprised. He asked me whether or not I could obtain some leave. [1380]

By Mr. Lewis Lyon:

Q. You were in the service at that time?

A. I was in the service. I was in the Navy at that time and on duty when he called me.

I asked him what it was about. He said, “Well, I have something very interesting.”

I said, “Wally, it would be difficult for me to get away.”

“Now could we see you tomorrow if we came up there?”

I told him, “Yes, I would be glad to see him.”

We made a date—I believe it was for the next day—to have lunch together. He said he was bringing another gentleman with him, and that was the gist of the conversation.

Q. Did you meet him at lunch, he and this other gentleman at lunch, the next day as planned? A. I did.

Q. Where?

A. I met them in—they came to the Ferry Building in San Francisco, my office, and we had lunch in a nearby restaurant.

Q. Who was this other gentleman?

A. Mr. White.

(Testimony of Niel Dahl)

Q. Sitting here at the table?

A. The gentleman there; yes, sir.

Q. Will you state the conversation that was had between you and Mr. White and Mr. Hulse at that time, or state if at all times all parties were present at that conversation too.

A. Well, the usual round of general conversation enjoyed over the early part of luncheon. Later on Mr. Hulse kept asking me rather pertinent questions about various things that I could not connect. He had not yet told me the purpose of his visit. He had introduced me to Mr. White as I believe, an attorney representing the York Corporation.

I didn't answer many of the questions—

The Court: What were you discussing? What did he say, in substance?

The Witness: Whether I knew and read about the water defrosting system of Trullinger & Eustice at Yamhill.

Not knowing why he had come previously, then I asked him directly what the purpose of the visit was, what he was attempting to do.

He admitted that they were interested in using that in an attempt to break down the patents of the Recold Company.

I told him at that time—I believe Mr. White was there at the table—that I was not particularly interested in being involved in any attempt to break down the patents of any company. I told him I didn't know what his interests were. He was representing Vilter at the time, and I knew that, but that I was not interested in any such action. [1382]

(Testimony of Niel Dahl)

Q. Did you have any further conversation with Mr. Hulse alone at that time?

A. Yes, we went into the washroom together—

The Court: Watercloset they call it here in patent cases.

The Witness: The watercloset then.

Mr. White: May I have the last question read?

(The question referred to was read by the reporter, as follows:

“Q. Did you have any further conversation with Mr. Hulse alone at that time?”)

By Mr. Lewis Lyon:

Q. Will you state what that conversation was.

A. The conversation mainly was on my part. Mr. Hulse is an old and a personal friend of mine. I asked him why he was so interested. He indicated that it meant considerable to him. I took at that time that it meant for possibly his company.

The Court: Did you say so?

The Witness: No, I don't believe so but I do recall having personally warned him that I did not feel that any action on his part in any such attempt would be considered good business if he intended to stay in the refrigeration game on the West Coast. [1383]

By Mr. Lewis Lyon:

Q. Was any indication made or any offer made to you at that time for recompense if you would testify for Mr. Hulse in this matter?

A. The only absolute indication was that on the telephone call, in that conversation he asked me if I wanted to make a trip to Los Angeles with my expenses paid.

(Testimony of Niel Dahl)

The general conversation was that it would be worth my while. I told him no, that I would not get leave, and that is when he suggested that they come to San Francisco.

Q. What did you understand Mr. Hulse's statement to mean that it would be "worth your while?"

Mr. Neave: Your Honor, I don't think that is a proper question.

The Court: Objection sustained.

Mr. Lewis Lyon: That is all.

The Court: Cross examine.

By the way, did you ever have any correspondence with your Portland office about the Yamhill installation, do you remember?

The Witness: No, your Honor, I can't remember directly. I had much correspondence with them, but to save time we usually made a lot of telephone calls, and I was there periodically.

The Court: Did you ever have any correspondence with [1384] the Carrier Corporation about that installation?

The Witness: Not to my knowledge.

The Court: Do you know whether or not your company ever got paid in full for the job?

The Witness: I cannot say definitely, but I would presume that possibly they did.

The Court: Go ahead.

Cross Examination

By Mr. Neave:

Q. Mr. Dahl, you said that you became acquainted with the Trullinger & Eustice job at the time that water

(Testimony of Niel Dahl)

defrosting was there. Now what was the date when you first saw that job with water defrosting?

A. I cannot fix that exactly.

Q. What year was it?

A. I would say it was possibly in the early part of 1937.

Q. You never saw it before then?

A. The installation?

Q. Yes. A. No.

Q. When did you get back from your trip to Montana? A. I made several trips.

Q. When did you get back from the trip to Montana after which you went to this job? [1385]

A. Well, I can't indicate that exactly.

Q. When you made this first trip in 1937 to this job, who was with you? A. Mr. Hulse. [1386]

Q. What did you do when you went there?

A. My primary purpose—

Q. I didn't ask you what the purpose was. I asked you what you did.

A. Well, I was introduced to various people and took a quick look at the job.

Q. Did you look at the outside of the freezer unit?

A. Yes.

Q. And that freezer unit was enclosed in an insulated enclosure, was it not? A. At that time, yes.

Q. Did you operate the defrosting mechanism?

A. No.

Q. When was the next time that you went to that job? A. I did not go again, that I recall.

Q. That is the only time that you went there?

A. I believe that is the only time that I was there.

(Testimony of Niel Dahl)

Q. You mentioned that there was trouble with the coil, and that it did not defrost all the way down?

A. That is correct.

Q. You never saw that yourself, did you?

A. No.

Q. You said "No"?

A. That is correct. The answer is "No."

Q. So that was something somebody else told you, was it [1387] not?

A. Those were according to the reports given me during discussions with my personnel, pertaining to the problems of the job.

The Court: Mr. Hulse?

The Witness: Mr. Hulse, Mr. Postlewaite, and several mechanics; two in particular that were involved at various times.

Q. By Mr. Neave: They were pretty familiar with the job? A. Quite.

Q. They installed it? They were there while it was being built? A. That's right.

Q. They serviced it? A. That is correct.

Q. Do you know whether any condenser unit was replaced on that machine?

A. Yes, to my recollection, that one condenser was frozen up.

Q. Do you know whether any more than one condenser was replaced in that machine? A. I do not.

Q. How much do those condensers cost?

A. Oh, possibly \$100.00. Whether it was replaced or [1388] rebuilt, I cannot say.

(Testimony of Niel Dahl)

Q. Now, you left the Refrigeration Engineering Company in September, 1937?

A. That is correct. The what company? The Electrical Products Corporation.

Q. I beg your pardon. The Electrical Products Company? A. That is correct.

Q. Did you have any contact with this Yamhill job after you left the company? A. I had not.

Q. You spoke of a conversation which you had had with Mr. Hulse and Mr. White. In San Francisco, was it? A. That is correct.

Q. And just where was that?

A. It was in a restaurant in approximately the 400 block on California Street.

Q. Was that in August, 1945?

A. I would say roughly August, some place around there.

Q. You don't remember the exact date?

A. I do not remember the exact date.

Q. The exact day of the month?

A. No, I was too busy with the war.

Q. Now, this conversation that you had with Mr. Hulse in the washroom, was that at the lunch place?

A. That is correct. [1389]

Q. Where did you leave Mr. Hulse and Mr. White?

A. Well, I believe we—if I remember correctly, we drove up in Mr. White's car or Mr. Hulse's, I have forgotten which, and they returned me to my office, if I remember correctly.

Q. You all three left the washroom together?

A. That is correct, we all three left the restaurant together.

(Testimony of Niel Dahl)

Q. The restaurant together. Isn't it a fact that you told Mr. Hulse and Mr. White that, to the best of your knowledge, this installation operated satisfactorily?

A. That is not correct.

Q. You deny that? A. I deny that.

Q. Why did you leave the Electrical Products Company?

A. Why?

Q. Yes.

A. We decided to liquidate the business.

Q. Why? Why did you do that?

A. Many reasons.

Q. Was it because it wasn't profitable?

A. Primarily it was not profitable; had operated for 18 months at a loss.

Q. Did you appear here under a subpoena?

A. I did not. [1390]

Q. Have you any interest in the defendant company?

A. I have not.

Q. Are you in the refrigeration business now?

A. I am not.

Q. What is your present business?

A. I have no business. I am attempting to build a home at the present time.

The Court: You were in service as an officer in the Navy?

The Witness: Yes, sir.

The Court: Were you assigned to the type of work that had to do with the installation of refrigerating apparatus, or the like?

The Witness: Yes. Refrigeration is a small, a very small portion of naval machinery. I was in the planning

(Testimony of Niel Dahl)

section of various naval yards and establishments as machinery planning officer.

The Court: Machinery planning officer.

Mr. Neave: I am having a hard time hearing the witness, your Honor.

The Court: He said he was a machinery planning officer in various naval yards and establishments and that refrigeration was a small portion of that business.

Q. By Mr. Neave: Did I understand you correctly when you said that you left the business in September, 1937, that was because the whole company liquidated at that time, and not [1391] merely the Portland office? Is that correct? A. That is correct.

Mr. Neave: That is all.

Mr. Lewis Lyon: That is all.

The Court: That is all. The witness may be excused. The next witness.

H. T. JARVIS,

recalled as a witness by and on behalf of the defendant, having been previously duly sworn, testified further as follows:

Direct Examination

The Court: What was Exhibit 107?

Mr. Charles Lyon: Five pages showing refrigerating capacities of York—

Mr. Neave: It was in for identification only. Your Honor exclude it.

The Court: Oh, yes, I remember what it was now.

(Testimony of H. T. Jarvis)

By Mr. Lewis Lyon:

Q. You have testified before in this case, haven't you, Mr. Jarvis? A. I have, sir.

The Court: That was marked for identification only. Did you take it?

Mr. Neave: No. Oh, yes, I did. It is being photo-stated, your Honor.

The Court: Oh, very well. [1392]

Mr. Neave: I forgot that.

Q. By Mr. Lewis Lyon: During the time of introduction, Mr. Jarvis, of the Recold water defrost system, did Refrigeration Engineering do any advertising?

A. We did what could be termed advertising by printing of the engineering catalogue.

Q. Any other advertising?

A. Yes, we printed a few envelope stuffers. That is all the advertising we did.

Q. Did you advertise in any periodicals?

A. Not at that time, no, sir.

Q. Does that include the years 1938, 1939 and 1940?

A. It does.

Q. Your entire advertising consisted in printing an engineering catalogue and printing a few leaflets; is that correct? A. That is correct.

Q. What was the cost of these leaflets?

A. Well, I would judge that the leaflets themselves cost not over \$200.00.

Q. What was the cost of the catalogue?

A. To give you the exact figure I would have to refer to the compilation of our advertising figures for those years that I gave you, Mr. Lyon, but I would say that that cost doesn't run over \$2,000.00. [1393]

(Testimony of H. T. Jarvis)

Q. Now, did you for the years 1939, 1940 and 1941 continue to print advance pages for that catalogue?

A. We printed a new catalogue every year.

Q. A new catalogue every year? A. Yes.

Q. You have stated that you gave me a compilation of advertising figures. I hand you a letter of such a statement. What is that?

The Court: What is the materiality of this?

Mr. Lewis Lyon: The materiality of this is to show the commercial success of this was not due to advertising.

The Court: All right.

The Clerk: That is FF.

The Court: All right, FF.

(The document referred to was marked as Defendant's Exhibit FF, for identification.)

The Witness: A. These are the figures that I turned over to you, Mr. Lyon.

Q. By Mr. Lewis Lyon: And those figures show the total advertising expenditures made for the years 1938, 1939 and 1940? A. And 1941.

Q. And 1941. What were they?

A. In 1938 the total advertising was \$4,461.68. In 1939 it was \$4,050.27. In 1940, \$3,958.41. In 1941, [1394] \$2,082.17.

Q. Does that include advertising all of the products of Refrigeration Engineering?

A. Yes, sir, it includes the advertising of all of our coils.

Q. Whether water defrost or not?

A. That is correct.

(Testimony of H. T. Jarvis)

Q. How many patents does the Refrigeration Engineering Company own or control, Mr. Jarvis?

A. Just this one, thank goodness.

Mr. Neave: I am sorry, I didn't hear that answer.

The Court: He said, "Thank goodness, just this one."

Q. By Mr. Lewis Lyon: What was the financial position of Refrigeration Engineering in 1938?

A. We showed a financial net worth of \$57,377.36.

Q. What were the total sales of the company at that time?

A. About 200,000.

Q. What is the financial position of Refrigeration Engineering at the present time?

A. The net worth is about \$250,000.

Q. What are the annual sales at the present time?

A. Last year a little over \$1,000,000.

Q. What proportion of that business is water defrost coils? [1395]

A. About 40 per cent would be my best estimate.

Q. You are acquainted, are you not, with Mr. W. C. Hulse?

A. I am.

Q. Did you ever at any time see Mr. Hulse at the Weidlein Company?

A. I did.

Q. On South Los Angeles Street in Los Angeles?

A. Yes, sir.

Q. When was that?

A. Either late 1939 or early '40.

Q. Who was present?

A. Mr. Carl Wilde sitting there was one of the gentlemen there, and Mr. Lee Weidlein, Mr. Jake Weidlein and Mr. R. W. Weidlein, the owner of the company, and a number of other salesmen whose names I don't recall for the moment.

(Testimony of H. T. Jarvis)

Q. Where did that conversation take place?

A. In Mr. Weidlein's office.

Q. Were you endeavoring to demonstrate any structure at that time, Mr. Jarvis?

A. Prior to any conversation between Mr. Weidlein and Mr. Hulse and myself, I had demonstrated our water defrost coil for the second time to the R. W. Weidlein group.

Q. Following this demonstration you had a conversation with Mr. Hulse, did you? [1396]

A. And Mr. Weidlein.

Q. Will you state what was said at that conversation?

A. At the conclusion of my talk to the salesmen, Mr. Weidlein called me into his—

Mr. Neave: Excuse me. May I make my usual objection to this line of testimony, your Honor, that if it is for any purpose other than impeaching a witness I object to it as hearsay,—other than impeaching Mr. Hulse, I object to it as hearsay.

The Court: I don't know what other thing it would be offered for, because the impeaching question was asked of Mr. Hulse and I take it this is impeachment of Mr. Hulse on that question.

Mr. Lewis Lyon: That is correct.

The Court: All right.

Mr. Neave: That is the only purpose.

The Court: It is limited then to impeachment.

The Witness: Would you give me the question again?
(The question referred to was read.)

The Witness: Mr. Weidlein called me into his office, and with Mr. Weidlein in his office was Mr. Hulse, and he said, "You know Wally here, don't you?" And I had

(Testimony of H. T. Jarvis)

met him, I believe, on a couple or maybe three different occasions prior to that, and I said, "Yes." He said, "Wally doesn't particularly like your water defrost coils." I said, "What is [1397] the trouble, Wally?" And he said, "Well, the trouble is that I have had experience with them and they just don't work." It is very difficult to give a word for word—in fact, it is impossible.

The Court: Well, give it in substance.

The Witness: Well, in substance—

The Court: Nobody is expected to remember every time they—I mean, everything said. I am picking up Mr. Trullinger's habit. [1398]

By Mr. Lewis Lyon:

Q. Just give the substance of the conversation as near as you can remember.

A. That was the preliminary substance. I asked him why, and he said that he had originated the water defrost idea and that if this water defrost idea caused me as much trouble as it did him, he would certainly suggest that I abandon the idea at that time.

Mr. Weidlein's rebuttal to that statement was to the effect that he had seen a job in operation and he was satisfied that they did work and that he was going to try them out.

Q. Did Mr. Hulse say anything else?

A. That is the conversation as I remember it.

The Court: Where is Weidlein now?

The Witness: Unfortunately he is dead, your Honor?

The Court: He died?

The Witness: Yes.

(Testimony of H. T. Jarvis)

By Mr. Lewis Lyon:

Q. Do you know what structure Mr. Weidlein referred to when he said that he tried it out as given in your last answer?

A. You mean Mr. Hulse and not Mr. Weidlein, don't you?

Q. No, I believe you stated that Mr. Weidlein said that he had tried it out and knew that it worked.

A. I am sorry, I meant to say that he had seen one. I [1399] had taken Mr. Weidlein to see an installation here in Los Angeles.

Q. Where, do you recall?

A. I believe it was the job down on Florence Avenue. The exact name of the job I would have to refer to the list of installations to give it to you.

Q. It was a Recold water defrost job?

A. That is right.

Mr. Lewis Lyon: That is all.

The Court: What is the biggest room that you have installed this method of refrigeration with the water defrosting in it?

The Witness: Your Honor, I believe the largest individual room that I recall is the Haslett Warehouse job.

The Court: The Payne job? The one Mr. Payne testified to?

The Witness: Yes, sir. I am not sure whether that is the largest single room or whether a job that the Army purchased during the war in San Francisco in which there is four identical rooms on four floors of a large warehouse. If my memory serves me correctly, the rooms are

(Testimony of H. T. Jarvis)

larger, but I have not seen them myself. The entire four floors were installed in accordance with the detailed installation of the Haslett job.

The Court: With water defrosting? [1400]

The Witness: Yes, sir, and the same model coils.

The Court: Have you had any kick-back or trouble with it?

The Witness: Nothing, your Honor, except to sell them coils for the installation.

The Court: I would like to ask another question: There has been sitting in the courtroom over here an apparatus. What is that?

The Witness: Do you refer to the Recold coil with the name plate on it, your Honor?

The Court: Not that thing on top, but what appears to be a unit.

The Witness: That is one of our standard water defrost low temperature coils, complete with header, fans and motors and housing and finned coil.

The Court: And pan?

The Witness: Yes, sir.

The Court: And the pan at the top and pan at the bottom?

The Witness: Yes, sir.

The Court: Do you have the capacity for that? How do you rate that?

The Witness: They are rated BTU's per hour per degree.

The Court: They are not rated per ton of refrigeration—what was it you called it? [1401]

Mr. Neave: Per ton of refrigeration.

The Court: Ton of refrigeration?

(Testimony of H. T. Jarvis)

The Witness: I believe that method of reference is a little bit outmoded, your Honor. The industry seems to be referring now to BTU's. Nobody but the old ammonia men seem to stick to the ice melting equipment, so far as I know.

The Court: What capacity do you call this?

The Witness: Without referring to the catalog at a specified temperature—in other words, it is rated on one degree, 10, 15—

The Court: How big a room would that keep refrigerated below freezing?

The Witness: For frozen food installation that coil in there will keep a room approximately 8 by 8 by 10 feet at zero degrees.

The Court: At zero degrees?

The Witness: At zero degrees or thereabouts, depending, your Honor, on the insulation.

The Court: On the insulation of the wall and the like?

The Witness: That is right. If there is six inches of insulation it will do a better job, than if there are only 4 inches.

The Court: What refrigerant does that machine use?

The Witness: That machine as it is built will handle sulphur dioxide, methyl chloride, or Freon, and the same unit [1402] is supplied with steel tubing for ammonia or brine as the refrigerant.

The Court: What is that tube in there now?

The Witness: Copper tubing.

The Court: Copper tubing?

The Witness: Yes, your Honor.

(Testimony of H. T. Jarvis)

The Court: All right. Mr. Neave, did you have some questions?

Mr. Lewis Lyon: I would like to ask one further question, if I might.

Q. Mr. Jarvis, have you any installations for freezing fish? A. Many of them.

Q. Using your water defrost?

A. Many of them.

Q. Did you install in Edmonton, Alberta, for the Menzies Fish Company, such a system in June of 1939?

A. We did not install it, no, sir, but we sold the coils that were installed in that installation.

Q. Do you know how large an installation that is?

A. I have the photographs in my office. Other than looking at the photographs, I believe the room to be about half as long as this room. I wouldn't know the exact dimensions. It is quite a large installation.

Q. Did you also have such fish installations in Honolulu, Wellington, New Zealand, and San Jose, California, and other points? A. We do.

Q. Did they operate successfully?

A. As far as I know there have never been any complaints.

Q. Do they operate on fish without wrapping?

A. That is correct.

Mr. Lewis Lyon: That is all.

The Court: What do you sell? Is that what you sell, that whole unit there?

The Witness: The complete package as you see it, with the 3-way valve, fan, motor, housing, spray pan over the top and spray pan underneath.

(Testimony of H. T. Jarvis)

The Court: That is your unit?

The Witness: That is one of the smaller units.

The Court: Do you sell any part of that without the rest of it?

The Witness: No, sir.

The Court: You sell that whole unit in different sizes?

The Witness: That is right.

The Court: All right. Any more questions?

Cross Examination

By Mr. Neave:

Q. And you do not sell the conduits between the valve [1404] and the inlet into the header?

A. We have several years ago sold the hose and hose clamps, but it was rather a clumsy proposition to supply hose for the various jobs because until the job was shipped to, say, Sacramento or San Francisco or New Zealand we had no way of knowing what length of hose was required, so we discontinued the practice of selling the connecting hose.

The Court: You mean the hose that goes on from there, such as is shown in the diagram?

The Witness: Yes, your Honor, the piece of hose that comes through the wall from the outside into the unit.

The Court: This is complete except for that?

The Witness: That is right.

By Mr. Neave:

Q. And the hose that goes out from the drain pan?

A. That is correct.

(Testimony of H. T. Jarvis)

Q. And you have discontinued that for some time?

A. Oh, the last time I recall that we sold any hose was early in the war.

The Court: Will you explain that to me? I mean, will you turn it around and show me which is which?

The Witness: Do you want me to go down there?

Mr. Charles Lyon: Shall we bring it over there?

The Court: Just put it on counsel table.

I know what the pan is now.

The Witness: You know what the fan and motor is? [1405]

The Court: Yes.

The Witness: This tube here, your Honor, leads into a simple copper shower head spray type—

The Court: Wait a minute now.

The Witness: May we open this up?

The Court: Yes.

That is the tube 16 in the patent?

The Witness: I wouldn't be sure, your Honor, without referring to the patent.

The Court: Have Mr. Lyon check that.

By way, on top, those are the angle irons by which it is attached to the ceiling?

The Witness: Yes, your Honor.

The Court: Do you want to put that in evidence?

Mr. Lewis Lyon: I would be glad to if it will do any good.

The Court: I can get whatever benefit I can get out of it right here, but I keep worrying about my brothers in the Circuit Court of Appeals.

(Testimony of H. T. Jarvis)

Mr. Lewis Lyon: That might be offered in evidence and left in the possession of myself or someone else so that it does not encumber the court.

The Court: I think you and Mr. Neave can agree as to whether it should or should not go in evidence.

Mr. Lewis Lyon: That is all I am worried about.

Mr. Charles Lyon: This doesn't belong to us. [1406]

Mr. Neave: It is entirely up to Mr. Lyon.

Mr. Lewis Lyon: I have made arrangements before with Mr. Neave that it will remain in my possession subject to your inspection at any time.

Mr. Neave: That is perfectly agreeable.

Mr. Lewis Lyon: And it could be presented to the Circuit Court of Appeals or any other court at any time at the request of either party.

Mr. Neave: That is perfectly agreeable, as long as it is exactly the same type of unit.

Mr. Lewis Lyon: It will be exactly the same unit. We will not change units.

The Court: All right.

The Witness: This is the spray header.

The Court: Is that correct, Mr. Lyon?

Mr. Lewis Lyon: Yes, your Honor.

The Witness: That is all it amounts to.

The Court: That is 16 and the pan is 14, and what are these? Are they added?

The Witness: Yes, sir. That is what I tried to explain in my first attempt here on which, on that job down on San Pedro Street, we failed to put it in originally. In other words, you can see in here, your Honor, this hanger that holds the fin section up to the top, this little tube

(Testimony of H. T. Jarvis)

with holes in it, goes on each side of there to defrost the return bends on [1407] both sides which accumulates ice although they don't accumulate them so rapidly.

The Court: All right.

Now what is the other tube coming out from there?

The Witness: This tube is the suction line, the refrigerant suction line from the coil.

The Court: That furnishes the refrigerating fluid?

The Witness: This tube here, your Honor, is where the expansion valve is mounted and from this tube is supplied the liquid refrigerant to the coil, and when that is boiled off it is drawn through this section line tube that is on top.

The Court: Back into the—

The Witness: Back to the condenser of the machine.

The Court: And where it goes through its cycle again?

The Witness: That is right.

The Court: Where is your bottom pan, 11a?

The Witness: If I turn it up here you can see the bottom. It is just an ordinary deep drip pan.

The Court: I see. Very well.

The Witness: I believe that covers it.

Mr. Lewis Lyon: Subject to the stipulation, I will offer this device in evidence as defendant's exhibit next in order.

The Clerk: Exhibit GG.

Mr. Neave: No objection.

The Court: Admitted. [1408]

(The device referred to was received in evidence and marked Defendant's Exhibit GG.) [1409]

(Testimony of H. T. Jarvis)

By Mr. Neave:

Q. Mr. Jarvis, would you please describe what it is that seems to be in this pan underneath the motor and surrounding the drain hole?

A. I would be glad to. Maybe I can remove it so you can see it.

The Court: Underneath the motor and surrounding the what?

Mr. Neave: The drain hole that is in the pan.

The Court: That is a valve, isn't it?

Mr. Neave: No, it looks like a strainer of some sort.

The Witness: This little screen is mounted up against the back of this pan directly over the drain hole for just one purpose. We had an occasion once of a piece of paper—how the piece of paper got into the drain pan the Lord only knows—but the paper got into that drain pan and when they defrosted the water overflowed and we had a very nice ice-skating rink on the floor. That is all it is for.

By Mr. Neave:

Q. Approximately what are the sizes of the openings in that screen?

A. About a quarter of an inch.

The Court: Quarter of an inch?

The Witness: A quarter of an inch—

Mr. Lewis Lyon: Wait a minute. We will measure it. [1410]

The Witness: It is closer to half an inch.

Mr. Lewis Lyon: Half an inch square.

The Court: In other words, what you mean to say is that it is a strainer or screen to catch any fouled ma-

(Testimony of H. T. Jarvis)

terial that might get into the apparatus other than ice or water.

The Witness: Well, there is no ice.

The Court: Well, if there is ice there you wouldn't have this whole law suit, would you?

The Witness: Does that answer your question?

Mr. Neave: Yes, it does. I have no other questions.

Mr. Lewis Lyon: That is all, Mr. Jarvis.

(Witness excused.)

Mr. Lewis Lyon: The defendant rests.

Mr. Neave: Mr. White, would you take the stand, please?

H. CALVIN WHITE,

called as a witness by and on behalf of the plaintiff in sur-rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: H. Calvin White.

The Clerk: Your address?

The Witness: 824 Richfield Building, Los Angeles.

The Clerk: Take the stand. [1411]

Direct Examination

By Mr. Neave:

Q. What is your occupation, Mr. White?

A. Patent lawyer.

Q. Are you a member of the bar of California?

A. I am.

Q. Did you hear Mr. Dahl testify in this case?

A. A portion of his testimony; yes.

(Testimony of H. Calvin White)

Q. Did you hear the portion of the testimony which he gave concerning the conversation which he had with you and Mr. Hulse in San Francisco? A. I did.

Q. Did you and Mr. Hulse have lunch with Mr. Dahl in San Francisco? A. We did.

Q. What was the date of that meeting?

A. April 14, 1945.

Q. Will you tell me what Mr. Dahl told you as to his best knowledge of the operation of the Yamhill unit?

A. My recollection is that his statement was brief and that the operation of the unit was satisfactory.

Mr. Neave: That is all.

The Court: Cross-examine?

Mr. Lewis Lyon: That is all.

The Court: Step down.

(Witness excused.) [1412]

Mr. Neave: That is all. The plaintiff rests, your Honor.

The Court: Everybody rest?

Mr. Lewis Lyon: Yes.

Mr. Neave: Yes.

The Court: Do you want to start arguing now?

Mr. Lewis Lyon: I think in the morning would be better, your Honor. The reason I got through in a hurry was to give myself a little time to prepare for it.

Mr. Neave: There is one matter that I would like to mention, if I might, your Honor.

We have not had an opportunity to go over all of the transcript as yet. One day's transcript we did not get

until the following morning, and through an error last night we didn't get yesterday's until this morning. Therefore there may be some errors in the transcript that we would like to call attention to. [1413]

The Court: You mean motions to correct the testimony?

Mr. Neave: Motions to correct the testimony. Could we do that later?

The Court: It will be taken for granted, even though both sides have rested, that you may still reserve that.

Mr. Lewis Lyon: I think there are a few slight typographical errors in the transcript that should be noted, and I think those can be agreed upon.

Mr. Neave: I think Mr. Lyon and I can agree on the changes and if we cannot agree why we can come back to your Honor.

The Court: Very well.

Mr. Lewis Lyon: That is satisfactory.

The Court: You can make a stipulation to that effect. How long do you want to argue?

Mr. Lewis Lyon: I don't anticipate requiring more than an hour, your Honor.

Mr. Neave: Your Honor's ruling has shortened my argument.

The Court: I think that it is mostly a factual situation.

Mr. Neave: Yes, I think it is.

Mr. Lewis Lyon: Factual and some legal propositions that I think we can amplify.

The Court: There are some legal questions. On your question of abandonment, by way of observation, I think you [1414] have the burden of proving to me that the Yamhill installation was an experiment.

Mr. Lewis Lyon: That is correct.

The Court: In order to give you some idea as to what is in my mind up to now, and certainly not by way of any ruling, it would look to me like there is an invention here, that is to say, this is capable of being an invention unless it was anticipated. I don't think of anything else right now that I can observe that will give you any guidance.

Mr. Lewis Lyon: I think that is very helpful, your Honor.

The Court: Very well. Recess to 10:00 o'clock.

(Whereupon, at 3:30 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., Friday, September 24, 1946.)

[Endorsed]: Filed Oct. 3, 1946. [1415].

[Endorsed]: No. 11642. United States Circuit Court of Appeals for the Ninth Circuit. Refrigeration Engineering, Inc., a corporation, Appellant, vs. York Corporation, a corporation, Appellee, and York Corporation, a corporation, Appellant, vs. Refrigeration Engineering, Inc., a corporation, Appellee. Transcript of Record. Upon Appeals From the District Court of the United States for the Southern District of California, Central Division.

Filed June 2, 1947.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11642

YORK CORPORATION,

Plaintiff,

vs.

REFRIGERATION ENGINEERING, INC.,

Defendant.

STATEMENT OF POINTS TO BE RELIED UPON
ON APPEAL

(York Corporation)

The District Court erred:

1. In not holding that all the claims of the McAdam patent are invalid in view of the prior patents and instances of prior use and sale proved herein.

2. In not holding that plaintiff does not infringe the McAdam patent in suit because it does not make, use or sell all of the elements of the patented combination.

3. In not holding that the apparatus described and claimed in the McAdam patent is a combination of old elements; that the combination does not produce a new result; and that each of the elements performs the same function in the combination that it does apart from the combination.

4. In holding that Claim 13 of the McAdam patent defines the invention disclosed in said patent, and in not holding that the claims of the McAdam patent fail adequately to describe the structure, mode, and operation of the parts of the combination and are phrased in functional terms.

5. In denying plaintiff's motion to amend the Complaint to include the charge that defendant has been and still is misusing its patent.

6. In not holding that the Recold unit sold by defendant is an unpatented product, since it does not embody all of the elements of the combination patented by McAdam, and that defendant, by charging plaintiff with infringement of said patent when plaintiff ceased to purchase the unpatented Recold unit from defendant, is attempting to promote the sale of an unpatented article through the use of its patent, which is a misuse of said patent.

7. In holding that plaintiff has not sustained the burden of proof of establishing either prior manufacture, use, sale or knowledge of the invention of the McAdam patent in suit, and in not holding that the prior patents and instances of prior use and sale proved by plaintiff anticipated the McAdam patent.

8. In holding that it required the exercise of inventive faculty to invent the combination as defined by Claim 13 of the McAdam patent and that the combination was novel and not anticipated, and in not holding to the contrary and that the idea of using water to defrost refrigerating coils within a space maintained below the freezing point of water was old prior to McAdam.

9. In holding that the invention of the patent in suit utilized water at ordinary tap temperatures for defrosting in a manner which was believed by those skilled in the art to be impossible of performance, and in not holding that many engineers knew, prior to the McAdam invention, that water could be used for the defrosting of coils positioned within a refrigerated space maintained at

a temperature below the freezing point of water, some of such engineers being the witnesses: Barton, J. Hayes, H. Hayes, Broms, Postlewaite, Hulse, Fuller, Brandt, Kennedy, Harkins, Tominac, Gaide and Mueller.

10. In holding that the teachings of the published art prior to McAdam was that water could not be used for defrosting within a refrigerated space maintained below freezing, and in not holding that the use of water to defrost at below freezing temperatures was taught prior to McAdam in Wenzl, U. S. Patent No. 2,097,851, and Jensen and Roser, French Patent No. 800,640.

11. In not holding that it was common plumbing practice prior to 1937 to so install water pipes in a space where temperatures below freezing were to be expected that the pipes would be self-draining upon the cessation of the supply of water to said space, which was usually accomplished by means of a three-port stop-and-waste valve.

12. In holding that the device of the McAdam patent solved a problem long existent in the refrigerating art, and in not holding that prior to McAdam there were several simple, inexpensive and efficient methods for defrosting refrigerating coils in below freezing installations, including warm air, warm brine, reversed cycle gas, electricity, and brine spray, all of which methods are still being installed today.

13. In holding that upon the introduction of the device of the patent in suit it was necessary for defendant to give guarantees of satisfaction, and in not holding that said guarantees were not necessary until after the first two installations made by defendant proved unsatisfactory.

14. In not holding that such commercial success as has been enjoyed by the Recold unit cannot be attributed to the McAdam patent, since the Recold unit is not the same unit as described and claimed in the patent.

15. In holding that the use of the Gayley process did not teach the refrigeration art that water could be utilized for defrosting refrigerating coils positioned within a refrigerated space maintained at temperatures below the freezing point of water, and in not holding to the contrary, and that the Gayley process established prior use and knowledge of the alleged invention of all of the claims of the patent in suit.

16. In holding that the sale to the Polar Ice Company does not anticipate the patent in suit and does not disclose the invention thereof, and in not holding that the depositions establish the prior invention and sale of an apparatus which anticipates all the claims of said patent.

17. In holding that the equipment sold to the Polar Ice Company was discarded and abandoned and that no other like system was ever installed or used by those interested in or instrumental in its construction and attempted use, and in not holding that the water defrost system which was sold and installed at the Polar plant in Indianapolis was accepted and paid for by Polar, was satisfactory and has never been discarded nor abandoned.

18. In holding that the depositions concerning the Swift & Company installation do not establish prior

manufacture, use, sale or knowledge of the invention of the McAdam patent No. 2,219,393 in suit, and in not holding to the contrary.

19. In holding that the depositions concerning the Yamhill installation did not establish that such installation was ever made, used, or sold, or that those taking part in the said installation or use had knowledge of the invention of the McAdam patent, and in not holding to the contrary and that the use of such installation for a period of about one year anticipated the claims of said patent.

20. In not holding that this action was filed with justification in law and in fact.

Respectfully submitted,

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Received copy of the within Statement of Points to Be Relied Upon on Appeal (York Corporation) this 4 day of June, 1947. Lyon & Lyon, by Charles G. Lyon, Attorneys for Refrigeration Engineering, Inc., Appellant and Respondent.

[Endorsed]: Filed Jun. 6, 1947. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause]

STATEMENT OF POINTS TO BE RELIED UPON
ON APPEAL

(Refrigeration Engineering, Inc.)

The District Court erred:

1. In holding that any of claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 14 of the McAdam Patent No. 2,219,393 in suit were invalid as not defining the entire combination of the McAdam patent.

2. In not holding that each and all of claims 1, 2, 5, 6, 7, 8, 9, 10 and 12 of the McAdam Patent No. 2,219,393 were infringed by plaintiff-cross-defendant.

Respectfully submitted,

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By Lewis E. Lyon

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Defendant, Cross-Complainant.

June 9, 1947.

[Endorsed]: Filed Jun. 10, 1947. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

STIPULATED DESIGNATION OF PARTS OF
RECORD TO BE PRINTED UNDER RULE
19(6).

It Is Hereby Stipulated and Agreed by and between the parties hereto, by their attorneys, pursuant to rule 19(6) of this court, that the following parts of the record on appeal shall be printed:

- (1) Certified copy of the docket entries, up to the date of the appeal.
- (2) Amended complaint.
- (3) Answer and cross-complaint.
- (4) Answer to cross-complaint.
- (5) Opinion (Transcript of Proceedings, page 1518, lines 9-21).
- (6) Findings of fact and conclusions of law.
- (7) Judgment.
- (8) Plaintiff's notice of appeal.
- (9) Defendant's notice of appeal.
- (10) Stipulated designation of contents of record on appeal.
- (11) Order with respect to stipulated designation of contents of record on appeal.
- (12) District Court Clerk's certificate accompanying record on appeal.
- (13) Plaintiff's concise statement of points to be relied upon on appeal.

(14) Defendant's concise statement of points to be relied upon on appeal.

(15) This stipulated designation of parts of record to be printed under rule 19(6).

(16) Plaintiff's Exhibits 1-7, 11, 13-21, 23-45, Y-1 to Y-9, Y-14 to Y-20, Y-22, Y-24, Y-27, Y-28, and trial exhibits 101-114.

(17) Defendant's Exhibits A, D, H, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, BB, CC and DD. [Written]: Exhibit A to Deposition of Witness Barton. LEL SEM

Dated: May 29th, 1947.

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[Endorsed]: Filed Jun. 6, 1947. Paul P. O'Brien,
Clerk.

No. 11642.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

YORK CORPORATION,

Plaintiff-Appellant and Cross-Appellee,

vs.

REFRIGERATION ENGINEERING, INC.,

Defendant-Appellee and Cross-Appellant.

Opening Brief of Refrigeration Engineering, Inc., Defendant-Appellee and Cross-Appellant.

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No. 11642.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

YORK CORPORATION,

Plaintiff-Appellant and Cross-Appellee,

vs.

REFRIGERATION ENGINEERING, INC.,

Defendant-Appellee and Cross-Appellant.

Opening Brief of Refrigeration Engineering, Inc., Defendant-Appellee and Cross-Appellant.

In these appeals, York Corporation* has appealed from a judgment of the District Court adjudging valid and infringed by York Corporation claim 13 of the McAdam Patent No. 2,219,393 for a Defrosting Device, and Refrigeration Engineering, Inc., has appealed from so much of that judgment as adjudges claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 14 of that patent invalid.

The action was commenced by York Corporation filing its complaint for Declaratory Judgment. Refrigeration Engineering, Inc., answered the complaint, admitted the

*Refrigeration Engineering, Inc., Defendant, Cross-Complainant, Appellee and Cross-Appellant, will be referred to herein as "Refrigeration Engineering"; York Corporation, Plaintiff, Cross-Defendant, Appellant and Cross-Appellee, will be referred to herein as "York Corporation."

existence of an actual controversy between the parties as to the validity and infringement of the patent, and filed its cross-complaint for infringement. Thus, the position of the parties in the usual patent infringement suit was reversed. At the trial of this cause by stipulation Refrigeration Engineering proceeded initially in the presentation of its evidence as owner of the patent asserting infringement on its cross-complaint.

Jurisdiction.

The District Court had jurisdiction of the "Actual Controversy" arising under the patent laws (Judicial Code 24, 28 U. S. C. A. 41(7)), and under the Declaratory Judgment Act (Judicial Code 274(d), 28 U. S. C. A. 400). This Court has jurisdiction of the appeals (Judicial Code 129, 28 U. S. C. A. 227). Both appeals were timely. The judgment was entered March 24, 1947 [I. 26].* Refrigeration Engineering's notice of appeal was filed April 22, 1947 [I. 27] and York Corporation's on April 23, 1947 [I. 28], both within thirty (30) days.

Statement of the Case.

The McAdam patent relates to an invention of a "defrosting device" for removing frost and ice from the coils and fins of a refrigerating unit located within a space continually maintained at a temperature below the freezing point of water. "Defrosting" means in this art the removal of frost or ice from the surfaces of the refrigeration device. Frost or ice collecting upon such surfaces effectively insulates the refrigerating device, stopping the

*The printed record herein is referred to by Roman numerals designating the volume, followed by the reference page numbers.

refrigeration. The invention involves the novel concept that this may be accomplished in a practical and efficient manner by flushing the coils with ordinary tap water, care being taken to insure the draining of the supply and drain lines immediately so that the water and melted frost and ice are not permitted to come to rest within the device. The McAdam device is "self-draining." Should the water or melted frost or ice be permitted to remain in the device it will freeze and leave the whole device useless.

The principle upon which this invention is based is that to change water at 32° F. into ice at 32° F. it is necessary to extract 144 B.T.U. of heat per pound from the water. To change the temperature of water 1° F. requires the mere extraction of one B.T.U. per pound. The McAdam patent in ~~utilizing~~ ^{utilizing} this principle solved a problem in below-freezing refrigeration which for many years remained without solution.

In the McAdam patent [IV. 1428] tap water at ordinary temperature existing in the supply pipe is conducted through pipe 17a by a valve 18 into the freezing chamber or space 10 by an inclined pipe 17. The water from the pipe 17 is sprayed through a spray header 15 over the frost and ice collected upon refrigerant coils 5 and fins thereof. The water passing over said coils and fins gives up heat, melting the frost and ice from the coils and fins. Dropping through the coils the water and melted frost and ice are caught in a pan 8 and pass through an inclined drain pipe 11-12, and are discharged outside the refrigerated space. The water and melted frost and ice are at no time allowed to stop within the refrigerated space 10 as the device is self-draining. The water sprayed over the coils gives up heat (less than 144 B.T.U.'s per pound) to melt the ice and frost. The water moving through the

system thus does not remain for a time sufficient to extract its entire heat of fusion (144 B.T.U.'s per pound) and does not freeze.

To provide continuous and efficient drainage, the supply line 17 to the spray head 15 is inclined and is provided with an ordinary three-way valve 18, one port of which leads to the water main and the other to the drain. This valve is normally open so that the instant the supply water is shut off, the inclined supply line drains outside the refrigerated space. The drain line 11-12 from the pan 8 is inclined and the water and melted frost and ice will continually drain from the refrigerated space. It is thus assured that both the supply to and drain from the refrigerating unit are "self-draining."

The evidence shows that prior to its introduction by McAdam the art was struggling with the problem of defrosting coils. Many systems were used, some were tedious and expensive. Some systems were dangerous as was the reverse cycling of the gas in the refrigerating system. One system was flushing the frost and ice off the refrigeration coils with a corroding salt brine. Another was subjecting the frost and ice to a blast of warm air. Another was manually chopping off the ice. [Cf. I. 116; Ex. R, IV. 1498; Ex. S, IV. 1500-1501.]

The record contains full surveys and explanations of the knowledge of the art just prior to the introduction of the McAdam invention. Skilled refrigerating engineers were concerned with the problem of defrosting such coils in such low temperature units and had published articles on the then known methods for so doing.

In the article entitled "Methods of Defrosting Various Types of Hardening Room Coils" by John C. Consley, Engineering Division, York Ice Machine Corporation

(York Corporation's earlier name [I. 121]), published in the September, 1934, issue of the "Ice Cream Review," the author stated the then known methods of defrosting to be:

1. Mechanically scraping or cutting the frost off [IV. 1476];
2. Air blasts from high pressure hoses [IV. 1477];
3. Spraying with a strong brine, said to be objectional [IV. 1477];
4. Spraying with hot water or steam, listing five serious objections [IV. 1477];
5. The hot gas method [IV. 1477-1478]; listing three subtypes [IV. 1478-9; Pltfs. Ex. 113, IV. 1476-9; and Defts. Ex. R, IV. 1509-1511].

Again, in the article "Defrosting: A survey of All Methods and Systems," by Siegfried Ruppricht, published in Refrigeration Engineering, the publication of the American Society of Refrigeration Engineers in June, 1936, and presented at the June, 1936 meeting of that society, there appears what purports to be an all-inclusive survey of the art as it stood at that time. A great number of expedients resorted to in such defrosting is described in detail and it is significant that the only mention of water defrosting is in the paragraph reading as follows:

"7. In emergency cases, service men pour water over thickly frosted coils, as is customary with metallic ice-cube trays, and this method could be employed in a permanent installation were it not for the trouble caused by water freezing in the piping during regular operation." [IV. 1512.]

Mr. Siegfried Ruppricht testified for Refrigeration Engineering, Inc., and told of the extensive survey he made of the art, prior to this publication [I. 138]. Mr. Ruppricht further testified that he was requested to make this survey and write this article by the Society of Refrigeration Engineers [I. 139]. The problem was then acute.

The state of the art just prior to the introduction of the McAdam invention is well established and it did not include knowledge of the McAdam invention.

There has been a remarkable success for that invention, but it was not immediately and easily achieved. The industry was skeptical and even went so far as to require Refrigeration Engineering, Inc., to offer guarantees of satisfaction* with each installation. [Finding of Fact No. 9, I. 15; see also I. 59, 70-71; Ex. D, IV. 1484; I. 124, 153-4, 156.]

Qualified experts, even experts then in the employ of the York Corporation, doubted the practicality of the McAdam invention even after it had been demonstrated [I. 57, 152-3, 194-7, 241].

When the operability of the invention was once demonstrated, it then went into widespread commercial use. This is shown by the fact that the Refrigeration Engineering Corporation has progressed since 1938 from a net worth of \$57,000 to a net worth of \$250,000, and its sales have risen from \$200,000 per year to \$1,000,000 per year, forty per cent of these sales being the patented units [III. 1093]. This success was achieved with little

*With its early installations Refrigeration Engineering, Inc., was required to give guarantees that if the water defrosting was unsatisfactory it would be removed and replaced with a conventional system (record as cited).

or no advertising [III. 1092]. Licensees had paid to the end of 1945 license fees in the sum of \$52,345.75 [I. 77]. After the success of the McAdam invention had thus been commercially proven, York Corporation itself used water defrosting in 11% of its sales since 1940, exclusive of military sales [III. 1032, 1045-6].

During the war approximately 50,000 McAdam type water defrosting refrigerating units were built for the armed services [I. 189, and Finding of Fact 15, I. 16], and at the Haslett Warehouse in Oakland, one of Refrigeration Engineering's first installations, 30,000-45,000 pounds of butter and blood plasma daily were handled [I. 172] during the war in a room required to be maintained at 20° below zero F. [I. 163].

There is no substantial issue with respect to infringement. A stipulation was entered into between the parties [Ex. CC, IV. 1527] describing two types of water defrosting refrigerating equipment, only the first type of which is involved in this suit. This stipulation admits the manufacture, sale and installation within the Southern District of California and elsewhere of defrosting devices operating within below freezing refrigerated spaces, and described as follows [IV. 1528-9]:

“Plaintiff has supplied water defrosting connections with its standard sectional coil unit, where the unit was installed to maintain a temperature well below freezing in the *refrigerated space*.

“This standard unit is made up of three sections: The bottom or drip pan section, the central or coil section, and the top or fan section. When equipped for water defrosting, the top or fan section is the same as in the standard unit, but the shallow condensate drip pan is replaced by a 6-inch drip pan,

which is drained by a 2½-inch line to the sewer. The drain line is trapped outside the refrigerated space to prevent warm air from being drawn in during the operation of the unit.

“The central or coil section is provided with a spray header, which has been blocked in in solid color on Exhibit A attached (Drawing No. F-P-8283). The header consists of a length of 2 inch pipe, capped at both ends, which runs along the top of the coil section. From the top of this pipe, extending laterally across the top of the coil, are eight ½” perforated pipes capped at the end. (Details of the laterals are shown on Exhibit B, drawing No. SP-8042-V.)

“As shown in Exhibit C (Drawing No. 178928Y), a 2 inch supply line extends down from the spray header to the bottom of the coil where it passes through the wall of the coil section and is connected, outside *the refrigerated space*, to the city water supply.

“Located in the supply line outside the refrigerated space between that space and the main control valve is a standard 2 inch three-way cock, shown in Exhibit D (Drawing No. J598). When the water is turned on and the three-way cock is in the ‘open’ position, water is supplied to the spray header and directed over the coil by means of the spray laterals. The water and melted ice and frost which falls by gravity to the drip pan below the coil, drains to the sewer by means of the 2½ inch drain line. When the water is turned off at the control valve and the three-way cock is turned to the ‘closed’ position, the water in the spray laterals, header and supply pipe is permitted to drain back through the three-way cock to the sewer. The spray laterals, header and supply pipe, as well as the drain line from the drip pan, are all pitched so as to permit efficient drainage.

Rubber hosing replaces the pipe in those sections of the supply and drain lines which pass through the wall of the *refrigerated space*, as shown in Exhibit D (Drawing No. J598).” (Emphasis ours.)

The record contains charts, Ex. DD [IV. 1540-1546] which are colored and numbered to illustrate how each of the elements of claims 1, 2, 5, 6, 7, 8, 12 and 13 are found in the identical form called for in the claims in the infringing units.

York’s second point to be relied upon [III. 1109] urges noninfringement. We understand this to be based upon an asserted failure to supply to its customers “a refrigerated space.” The foregoing stipulation, Ex. DD, is the only description of the infringing devices in the record and therein it is stipulated that:

“Plaintiff has supplied water defrosting connections with its standard section coil unit, where the unit was installed to maintain a temperature well below freezing in the *refrigerated space*.”

No request for relief from the stipulation was ever made.

York Corporation’s defense to the McAdam patent in suit is based upon certain enumerated prior patents and prior uses. The District Court found [Finding 20, I. 17]:

“20. That plaintiff has not sustained the burden of proof of establishing either prior manufacture, use, sale or knowledge of the invention of the McAdam patent in suit.”

Further detailed findings were entered with respect to each of the asserted prior uses, finding:

That the so-called Gayley Dry Blast was not self-draining [Finding 21, I. 17], did not involve below freezing temperature during defrosting [Findings 23, 24, 25, 26, 27, I. 17-18];

That the so-called Polar Ice installation was not self-draining, was not provided for refrigeration below the freezing point of water and was abandoned and discarded [Findings 28-32, I. 18-19];

That the Swift & Company installation did not involve refrigeration below the freezing point of water, was not self-draining and on the contrary, where such below freezing refrigeration was used by Swift & Company, another system of defrosting was employed [Findings 33-36, I. 19-20];

That the Yamhill installation was an abandoned experiment [Finding 38, I. 20], was not established to have been made, used or sold [Finding 36, I. 20], and it was established that several methods of defrosting were attempted unsuccessfully and abandoned [Finding 39], and that the installation is now using hot air defrosting.

Further, with respect to this "Yamhill" installation, it was found that when water defrosting was attempted, the coils were *outside* of the refrigerated space [Finding 40, I. 20], and it was *not* established that the temperature thereof was below freezing [Finding 41, I. 21]. The at-

tempt to use water defrosting was unsatisfactory [Finding 42]. This installation was not paid for [Finding 43], was forgotten and never repeated [Finding 45].

Further, although York Corporation's witnesses had records of the facts, such records were not produced and it never was established just when the attempt to use water defrosting at Yamhill began and ended [Finding 46, I. 21]. The chief witness to this alleged prior use was impeached and his testimony found unworthy of belief [Finding 47, I. 22].

York Corporation also relies upon two prior patents, the United States patent to Wenzl, No. 2,097,851, and the French patent to Jensen & Roser, No. 800,640, as disclosing "The use of water to defrost at below freezing temperatures" [Point 10, III. 1111]. Neither of these patents anticipates the patent in suit in that no structure is disclosed in either by which they are "self-draining," and in that, failing to state the temperature conditions maintained during defrosting, they do not even involve the problem solved by McAdam.

The District Court found as a fact [Finding 48, I. 22] and as a conclusion of law [*id.* 23] that claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 14 of the McAdam's patent are invalid as not defining the entire invention of the McAdam patent. As a matter of law, the District Court erred in this.

Further, toward the conclusion of the trial, the plaintiff moved to amend its complaint to allege that defendant is

barred from relief because it has misused the patent in suit in an effort to control competition in unpatented devices [III. 1053]. This motion was denied [III. 1060, 1062, 1063]. This motion was based on an assertion by counsel for plaintiff that the evidence showed that Refrigeration Engineering, Inc., was selling less than the entire patented combination. The District Court concluded that the evidence was to the contrary and on this ground and on the ground that the motion was untimely, denied the motion [III. 1061].

Questions Involved on York Corporation's Appeal.

1. Is the patent in suit invalid in view of the prior uses of the "Gayley Dry Blast" system, the Swift & Company, Elmira, New York, installation, the Polar Ice & Fuel Co. installation at Indianapolis, or the Trullinger and Eustice installation at Yamhill, Oregon?

2. Is the patent in suit invalid for want of patentable invention?

3. Is the patent in suit infringed by the York Corporation's "Unit sold to private concerns" described by stipulation?

4. Is the patent in suit anticipated by the prior United States patent to Wenzl or the prior French patent to Jensen & Roser?

5. Did the District Court err in denying plaintiff's motion to amend its complaint to allege a misuse of the patent in suit?

Question Involved on Refrigeration Engineering, Inc.'s, Appeal.

1. Did the District Court err in holding that claims 1-12 and 14 are invalid as failing to define the entire invention of the McAdam patent?

Summary of Argument.

The District Court found as a fact that the McAdam patent involved invention. The question of invention is one of fact, and this finding is in accord with the overwhelming weight of the evidence. The McAdam patent meets the tests for invention laid down by the courts; it has largely supplanted the earlier salt-brine method; it filled a long felt want; it is simple, but was long overlooked, and prior to its introduction the art was struggling along with inefficient, cumbersome and sometimes dangerous expedients; initially the art was skeptical of the invention, not believing it would work, but it has gone into widespread commercial use; competitors have paid large sums as license fees, and York Corporation's slavish infringement is evidence of what York Corporation thinks of the invention.

The District Court properly concluded that the McAdam invention was novel, useful and not anticipated by anything existing in the prior art.

The McAdam invention is not anticipated by the "Gayley Dry Blast" installations, as these installations were not "self-draining"; were not maintained below freezing during defrosting; and involved a system of vanes or doors for shutting off and isolating the several compartments during defrosting.

The McAdam invention is not anticipated by the Polar Ice Co. installation. It was not self-draining; it was

not a below-freezing installation; it was abandoned and never revived.

The McAdam invention is not anticipated by the Swift & Co. installation. This was another above-freezing installation and was not self-draining. Swift & Co. had a below-freezing room but in that used a different method of defrosting.

The McAdam invention is not anticipated by the “Yamhill” installation. This installation was found to be an unsuccessful, abandoned experiment and did not involve below-freezing temperatures during defrosting, but used a system of vanes and doors to isolate the unit during defrosting.

The McAdam invention is not anticipated by the U. S. patent to Wenzl or the French patent to Jensen and Roser. These patents do not embody the McAdam combination and are mere inoperative suggestions.

York Corporation has infringed claims 1, 2, 5, 6, 7, 8, 12 and 13 of the McAdam patent. The facts with respect to infringement are not in controversy, being fully established by stipulation.

The District Court erred in concluding that claims 1-12 and 14 of the McAdam patent are invalid as failing to define the entire invention of the McAdam patent. Claims 10 and 11 clearly contain the full invention, and when properly construed by reference to the specification, as required by law, so do each of the others.

The District Court did not err in denying York Corporation's motion to amend its complaint to allege misuse of the patent in suit. The evidence does not establish such misuse; and also the motion was untimely.

ARGUMENT.

I.

The District Court Found as a Fact That the McAdam Patent Involved Invention.

“* * * The question whether an improvement requires mere mechanical skill or the exercise of the faculty of invention is one of fact; and, in an action at law for infringement, is to be left to the determination of the jury. * * *” (*Thompson Spot Welder Company v. Ford Motor Company*, 265 U. S. 445, 446, and citing cases.)

The District Court found:

“18. That it required the exercise of inventive faculty to invent the combination as defined by Claim 13 of the Letters Patent No. 2,219,393.” [Finding 18, I. 16.]

This finding is in accordance with the overwhelming weight of the evidence. The McAdam invention meets all of the tests laid down by the courts for determining the exercise of invention as distinguished from the mere skill of the calling.

The closest approach to the McAdam invention in the prior art is the salt brine method of defrosting in which a concentrated salt solution is sprayed over the coils, the salt being added to reduce the freezing point of the liquid and prevent its freezing. The District Court heard testimony comparing this method of defrosting with the McAdam invention. The Haslett Warehouse in Oakland contains four large refrigerating rooms, each of identical size. In three of these rooms exposed pipes containing refrigerating brine were used. In the fourth of these rooms the McAdam invention as embodied in

Refrigeration Engineering, Inc., Recold System was used. The witness, James R. Payne, testified on behalf of Refrigeration Engineering, Inc., and described defrosting in these rooms. In one attempt at defrosting the old units with salt brine the witness used up \$150.00 worth of salt (calcium chloride). The job took three days and nights. It was necessary to remove the butter from the room as the refrigeration was shut off and the temperature rose to 30° above zero [I. 160-161]. In contrast to this, in the fourth room where the patented invention was installed, defrosting took seven or eight minutes, with no substantial temperature rise [I. 181-182] or necessity for removing the butter.

The District Court asked counsel for York Corporation to locate a brine spray defrosting unit in Los Angeles so that the court might inspect it. However, so thoroughly has the McAdam invention supplanted this salt brine method that counsel was unable to locate such a unit and advised the court that none existed in Los Angeles [I. 233].

The art had simply failed to realize that by making the system entirely “self-draining” this expensive salt could be eliminated.

While in retrospect the invention may now appear to be simple, this is evidence of the presence of patentable invention rather than being a bar thereto. While it may be wondered why such a simple, facile and efficient but economical method of defrosting the coils of low-temperature units was not earlier provided, the fact is the evidence shows that the art was struggling along with cumbersome, costly, and often dangerous expedients, such as reversing the cycle of the refrigerant gases, the so-called hot gas method, or providing complicated electrical

heating elements, or providing oversized units which could be shut off long enough to defrost themselves, and the like. The McAdam invention, even if simple, was certainly long overlooked.

What was said of the Grant tire patent by the Supreme Court in *Diamond Rubber Company of New York v. Consolidated Rubber Tire Company*, 220 U. S. 428 at 435, is applicable here:

“* * * Many things, and the patent law abounds in illustrations, seem obvious after they have been done, and ‘in the light of the accomplished result,’ it is often a matter of wonder how they so long ‘eluded the search of the discoverer and set at defiance the speculations of inventive genius.’ *Pearl v. Ocean Mills*, 2 Bann. & Ard. 469, Fed. Cas. No. 10,876, 11 Off. Gaz. 2. Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skilful attention. But the law has other tests of the invention than subtle conjectures of what might have been seen and yet was not. It regards a change as evidence of novelty, the acceptance and utility of change as a further evidence, even as demonstration. * * *”

As said by the Court of Appeals, Seventh Circuit, in *Pyle Nat. Co. v. Lewin*, 92 F. (2d) 628, at 630:

“It is also insisted that the idea involved in appellee’s device is so simple and obvious it does not constitute invention. True, it now has that appear-

ance. The fact, however, that this improvement was long overlooked, using devices far less satisfactory, cannot be ignored. As was said in *Expanded Metal Company v. Bradford*, 214 U. S. 366, on page 381, 29 S. Ct. 652, 656, 53 L. Ed. 1034: 'It may be safely said that if those skilled in the mechanical arts are working in a given field, and have failed, after repeated efforts, to discover a certain new and useful improvement, that he who first makes the discovery has done more than make the obvious improvement which would suggest itself to a mechanic skilled in the art, and is entitled to protection as an inventor.' "

Aronson v. Toy Devices, Inc., 1 F. (2d) 91, at 92 (C. C. A. 3):

"* * * Mere simplification of a substantial character, disposing of parts which have long been in use, may amount to invention. 'To obtain simplicity is the highest trait of genius.' *Hobbs Manufacturing Co. v. Gooding et al.*, 111 Fed. 403, 406, * * *."

James P. Marsh Corp. v. United States Gauge Co., 129 F. (2d) 161, at 163 (C. C. A. 7):

"* * * Presumptuous indeed are the judicial pronouncements which are written in overconfident condemnation of seemingly simple, novel combinations."

See also:

Young Radiator Co. v. Modine Mfg. Co., 55 F. (2d) 545 (C. C. A. 7);

Potts v. Creager, 155 U. S. 596, 608.

Ia.

The McAdam Invention Filled a Long-Felt Want in the Refrigerating Art.

The evidence shows that the refrigerating art had long been struggling with a problem of satisfactorily defrosting the coils of low-temperature refrigerating units; that prior to the McAdam invention no satisfactory solution to this problem had been made. Defrosting was a serious problem [III. 898].

In the article "Methods of Defrosting Various Types of Hardening Room Coils" by John C. Consley, Engineering Division, York Ice Machinery Corporation, published in the *September 1934* (four years before McAdam's invention came on the market) issue of "The Ice Cream Review," one of York Corporation's own employees [I. 121] offered to the trade a publication which stressed the duty of the engineers to maintain the highest efficiency of refrigerating units by proper defrosting. This report concluded:

"* * * Defrosting is best accomplished in most instances by the hot gas method, * * *." [IV. 1480.]

It is significant that while this report offers five methods for defrosting such coils, one of which methods had three subtypes, no mention of water defrosting using simple tap water was suggested. Indeed, the author does suggest using hot water or steam, but states:

"* * * This method is seldom used, except in very small plants.

"The objections to this method are: (1) It is a rather sloppy practice: (2) it is slow, unless there is a large amount of hot water or steam available: (3) the very rapid and very great change in tem-

perature is somewhat dangerous to the coil and concrete floor: (4) much insulation has been ruined by this method: (5) the coil should be pumped out and liquid stored elsewhere before defrosting, otherwise there is a danger of excess pressure due to high temperature of ammonia in the coils. If the compressor is kept in operation, to avoid excess pressures, there is danger of the liquid slopping over in great quantities." [IV. 1477.]

The evidence shows that defrosting coils (even in rooms maintained 52° below the freezing point of water) is very quickly and very economically produced by the McAdam invention [I. 181-2]. The McAdam invention clearly filled a long-felt want in the art which was resorting to such tedious and impractical expedients as:

(1) Mechanically scraping or cutting off the ice, "a tedious process" [IV. 1476];

(2) Blasting the coils with hot air from high pressure hoses [IV. 1477];

(3) The brine method, of which the author states:

"This system is costly, since the brine is weakened by the amount of frost that is removed, and either must be reclaimed, or new brine made for each defrosting. It is also generally objectionable in ice cream plant hardening rooms, being sloppy, and requiring pans to catch the brine dripping from the coils." [IV. 1477; see *ante* pp. 15-16.]

(4) The hot water or steam method discussed above [IV. 1477]; and

(5) The hot gas method in which a hot gas from the compressor is run in the coils to heat the coils

rather than a cool gas from the condenser. An examination of pp. 1477-1479 of the transcript will indicate the amount of manipulation of the units required to utilize this method of defrosting, the problems involved and the special equipment necessitated.

Again in the article "Defrosting: A Survey of All Methods and Systems" by Siegfried Ruppricht (read at the June 1936 meeting of the American Society of Refrigeration Engineers, published in the magazine "Refrigeration Engineering," and purported to be an all-inclusive survey of the defrosting art as it stood at that time), we find the same long unfilled want. The author here again lists mechanically scraping off the ice [par. 1, IV. 1512]; a method of building up the pressure and suddenly releasing it, which is said to blast the frost away [par. 2, IV. 1512]; coating the exposed surfaces with rubber to which ice will not stick [par. 3, IV. 1512]; salt brine spray [par. 4, IV. 1512]; the salt tray method in which trays of salt are placed adjacent the evaporator coils to form a brine [par. 5, IV. 1512]; various chemical methods [par. 6, IV. 1512]; the use of two refrigerating units, each alternately, one defrosting while the other operates [par. 8, IV. 1512]; shutting off the refrigeration in small installations where heat is present sufficient to melt the frost [par. 9, IV. 1512-13]; electrical heating [pars. 10, 11, 12, IV. 1513]; hot brine within the coils [par. 13, IV. 1513]; hot air blast [par. 14, IV. 1513]; passing into the coils warm unexpanded gas [pars. 15 and 16, IV. 1513-14]; the reverse cycle or hot gas method

[par. 17, IV. 1514]. The only mention made which might approach water defrosting as described in the McAdam patent is the statement:

“7. In emergency cases, service men pour water over thickly frosted coils, as is customary with metallic ice-cube trays, and *this method could be employed in a permanent installation were it not for the trouble caused by water freezing in the piping during regular operation.*” [Emphasis supplied; par. 7, IV. 1512.]

Self-drainage cannot have been obvious to this expert in this art. Without self-drainage the McAdam apparatus would likewise be inoperative. With self-drainage continuous operation of the plant was possible with the freezing element located within a space continuously maintained below the freezing point of water.

This problem and the long felt want is evidenced by the manual published by defendant York Corporation [Defts. Ex. R, IV. 1498]. This manual, dated February 1, 1936, states that the York Corporation was using the hot gas method of defrosting while warning that in below-freezing installations a drain line for the melted frost could not be used as it would become frozen shut.

The McAdam invention is thus proven to have supplied a long-felt want and solved a critical problem in the refrigeration art. The Supreme Court has recognized that these facts:

“* * * should, in a close case, tip the scales in favor of patentability. * * *” (*Goodyear Tire & Rubber Company, Inc., v. Ray-O-Vac Company*, 321 U. S. 275, 279 (1944) (citing numerous cases).)

“* * * This, of itself, is persuasive evidence of that invention which it is the purpose of the patent laws to reward and protect. * * *” (*Minerals Separation v. Hyde*, 242 U. S. 261, 270.)

The reason for this test of invention is stated in *Paramount Publix Corporation v. American Tri-Ergon Corporation*, 294 U. S. 464, 474:

“* * * Where the method or device satisfies an old and recognized want, invention is to be inferred, rather than the exercise of mechanical skill. For mere skill of the art would normally have been called into action by the generally known want.”

See also:

Iron Fireman Mfg. Co. v. Industrial Engineering Corp., 89 F. (2d) 904, at 909 (C. C. A. 7);

Delta Mfg. Co. v. E. L. Essley Machinery Co., 153 F. (2d) 905, at 906 (C. C. A. 7);

Forestek Plating & Mfg. Co. v. Knapp Monarch Co., 106 F. (2d) 554 (C. C. A. 6);

Tyra v. Adler, 85 F. (2d) 548 (C. C. A. 8).

Ib.

The Refrigeration Art Was Sceptical of and Ridiculed the McAdam Invention. Even After Appellee Introduced This Invention the Art Refused to Accept It Until Its Success Was Proven by Use.

It was necessary for Refrigeration Engineering, Inc., to overcome an initial scepticism on the part of the refrigeration industry in order to obtain adoption of the McAdam invention.

It cannot be said that it was obvious to introduce water into a space which may be perhaps 52° below the freezing point of water in the hope of removing frozen water.

There is indeed an element of daring in the suggestion. This is completely demonstrated by the fact that the refrigeration industry originally scoffed at the McAdam invention and refused to accept it, going so far as to require guarantees of complete satisfaction from Refrigeration Engineering, Inc., under which guarantees Refrigeration Engineering, Inc., was forced to undertake to remove the McAdam water defrosting units and replace them with conventional units in the event that they were not completely satisfactory.

The District Court found:

“9. That upon introduction of the invention of the patent in suit to the art, the engineers in the art did not believe that the device of the McAdam patent in suit would function to defrost coils within a refrigerated space maintained below the freezing point of water and it was necessary for defendant corporation to give guarantees of satisfaction in order to make installations of devices embodying the invention of the Letters Patent in suit.” [Finding 9, I. 15.]

This finding is amply supported by the evidence. [I. 59, 70-71; Ex. D, IV. 1484; I. 124, 153-4, 156.]

Qualified refrigeration experts doubted the practicability of the McAdam invention, even after it had been demonstrated [I. 57; I. 152-3]; when an attempt was made to interest the York Corporation in the McAdam invention the York experts in Los Angeles deemed the invention unsound [I. 194, 197], declaring that it was an exploded idea which would not work [I. 240, 241].

Ic.

Having Been Proven Practical and Efficient, the McAdam Invention Went into Widespread Commercial Use.

The evidence shows that after the feasibility of the McAdam invention was demonstrated to the trade, particularly by the Johnson Pie installation in Los Angeles [I. 235-9] and the Haslett Warehouse installation in Oakland [I. 157-185], the invention went into widespread commercial use. The success of Refrigeration Engineering Inc.'s business is largely due to McAdam's invention [III. 1093]. It has progressed since 1938 from a net worth of \$57,000 to a net worth of \$250,000, its sales correspondingly rising from \$200,000 a year to \$1,000,000 per year [III. 1093]. Its success was achieved with substantially no advertising [III. 1092]. The licensees of Refrigeration Engineering, Inc., under the McAdam patent, had paid to the end of 1945 royalties in the sum of \$52,345.75. Further, some 50,000 water defrost refrigeration units were built for the armed services during the war [I. 189; Finding 15, I. 16]. This remarkable commercial success, together with the compliment of infringement which has been paid to the McAdam invention by the York Corporation by embodying water defrosting in 11% of its sales, exclusive of sales to the armed services [III. 1032, 1045-6], is further demonstration of the fact that McAdam's contribution to

the art involved patentable invention. As said by the Supreme Court in *Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 261 U. S. 45, 56:

“The fact that the Eibel pitch has thus been generally adopted in the paper-making business, and that the daily product in paper making has thus been increased at least 20 per cent over that which had been achieved before Eibel, is very weighty evidence to sustain the presumption from his patent that what he discovered and invented was new and useful. * * *”

Further, as said by the court in *Wahl Clipper Corp. v. Andis Clipper Co.*, 66 F. (2d) 162 at 165 (C. C. A. 7):

“* * * More persuasive evidence than the action of competitors in taking licenses and paying substantial royalties for the privilege of selling the patented article can hardly be found.”

Further, York Corporation's slavish imitation of the McAdam patent is itself very strong evidence of invention:

“The imitation of a thing patented by a defendant, who denies invention, has often been regarded, perhaps especially in this circuit, as conclusive evidence of what the defendant thinks of the patent, and persuasive of what the rest of the world ought to think. * * *” (*Kurtz v. Belle Hat Lining Co.*, 280 Fed. 277, at 281.)

“* * * The prior art was open to the rubber company. That ‘art was crowded,’ it says, ‘with numerous prototypes and predecessors’ of the Grant tire,

and they, it is insisted, possessed all of the qualities which the dreams of experts attributed to the Grant tire. And yet the rubber company uses the Grant tire. It gives the tribute of its praise to the prior art; it gives the Grant tire the tribute of its imitation, as others have done. And yet the narrowness of the claims seemed to make legal evasion easy. Why, then, was there not evasion by a variation of the details of the patented arrangement? Business interests urged to it as much as to infringement. We can find no answer except that given by the tire company: 'The patented organization must be one that is essential. Its use in the precise form described and shown in the patent must be inevitably necessary.' " (*Diamond Rubber Company of New York v. Consolidated Rubber Tire Company*, 220 U. S. 428, 441.)

In such a case we may ask the same question of the York Corporation as was asked by the court in *Wahl Clipper Corp. v. Andis Clipper Co.*, 66 F. (2d) 162 at 165 (C. C. A. 7):

"* * * In explaining its action in thus changing its vibrator, appellee (Andis Company) argues that it was within its legal rights in so acting. Conceding for the moment its legal rights, the question exists, Why change its type of vibrator unless the article copied possessed merit? And why was not the change made earlier if the article possessed merit and its production was obvious to a mechanic skilled in the art?"

II.

The District Court Properly Concluded That the McAdam Patent Was Novel, Useful, and Not Anticipated by Anything Existing in the Prior Art [Finding of Fact 19, I. 17].

IIa.

The Patent in Suit Is Not Anticipated by the Gayley Dry Blast Installations.

The York Corporation took depositions in an attempt to establish an alleged prior use of water defrosting in the so-called Gayley dry blast installations. These installations were mammoth structures designed to cool the air feed to a blast furnace in order to regulate the amount of moisture therein. Concerning them, the District Court found that in these installations the pipes for spraying the water over the coils were not self-draining, but were horizontally disposed, as were pipes leading to and from the chamber containing the coils [Finding 21, I. 17]. Further, the District Court found that during the period of defrosting the chambers containing the coils were above the freezing point of water [Finding 22, I. 17] and that during defrosting the refrigerant was withdrawn from the coils and the temperature of the refrigerant so withdrawn was above the freezing point of water [Finding 23, I. 17]. Further, the court found that the time element during defrosting was such that the space containing the coils was above the freezing point of water and, hence, the Gayley dry blast process did not provide a refrigerating coil positioned within a refrigerating space constantly below the freezing point of water [Findings 24 and 25, I. 17-18]. These findings are amply supported by the evidence.

The determining factor with respect to these so-called “Gayley Dry Blast Installations” is that they were not “self-draining” and were not located in a space constantly maintained below the freezing point of water, especially during the defrosting operation.

The first sentence of the McAdam patent in suit states: “My invention relates to low temperature refrigeration where a space is required to be constantly maintained at temperatures below the freezing point of water, * * *.” Claim 13 (held to be valid and infringed) calls for “* * * the air of said space does not rise above the freezing point of water during the defrosting period, * * * .” [IV. 1432, col. 2, lines 44-5.] Clearly the McAdam invention is not anticipated by a refrigerating apparatus which is not maintained *constantly* below the freezing point of water; particularly is this true where the operation of the alleged anticipating device was based upon permitting it to warm up during the crucial period—the defrosting period.

Further, the McAdam patent requires both the supply line and drain line to be “self-draining.” Self-draining is essential to the success and to the mode of operation of McAdam’s apparatus. Clearly the McAdam patent is not anticipated by an installation which was neither self-draining nor located in a space constantly maintained below the freezing point of water.

The District Court’s findings of fact [19, 21-27] are in accordance with the overwhelming weight of the evidence. The evidence shows that each of the three “Gayley Dry Blast” installations consisted of large buildings divided into a number of separate compartments, each containing separate brine coils for cooling a stream of air and each operated independently of the others [Brandt, I. 315-

316; Kennedy, I. 363; Tominac, II. 507; Mueller, II. 579, 594]. Thus there were four separate compartments at the Isabella Furnaces, seven at Illinois Steel South Chicago Works and, again, four at Mayville.

These compartments were defrosted, one by one, at the rate of one per day. In each case the first step was to close off the particular compartment to be defrosted from the others and the stream of air by closing doors or shutters, both leading in and leading out of the chosen compartment [Brandt, I. 318, 327-8; Kennedy, I. 363; Harkins, II. 386; Tominac, II. 508; Mueller, II. 596]. Concurrently the refrigerating brine was drained out of the brine coils. This brine was pumped completely out of the compartment [Brandt, I. 318-9; Kennedy, I. 364; Harkins, II. 386; Tominac, II. 508; Mueller, II. 580, 597]. This, of course, permitted the chosen compartment to begin immediately to warm up. There was no further refrigerant being supplied and, in fact, outside air was vented into the coils [II. 596]. At least the lower portion of the coils never was reduced below approximately 35° F. or several degrees above freezing, as the refrigerating brine itself came out at that temperature [Tominac, II. 532; Mueller, II. 615]. This is further shown by the fact that at least the lower one-third and probably the lower two-thirds of the coils never reached freezing as they were constantly dripping wet [II. 614].

Further, in each case the time element involved was of such duration, even before the coils were sprayed with water, as to insure that the compartment during the spraying would be well above freezing. The total defrosting time was several hours [Brandt, 1½ to 1¾ or more hours, I. 319, 341; Tominac, 3½ to 5½ hours, II. 509; Mueller, 3 to 5 hours, II. 619; 11 to 12 hours, II. 621],

and in each case a substantial period of time elapsed between the shutting down and closing off of the chosen compartment and the turning on of the water spray [Brandt, I. 318-9; Tominac, II. 510; Mueller, II. 596-7].

While there was an attempt to prove that these units reached freezing temperatures during operating periods, not one witness testified to the temperature in the compartments during the defrosting periods. The closest that any of York Corporation's or any other witness came was when the witness Kennedy testified that the compartment was below freezing "when you *started* to defrost" [I. 365; emphasis ours].

Further, the physical construction of these plants precluded them from being "constantly maintained at temperatures below the freezing point of water," because the water pipes within the compartments were horizontally positioned, preventing self-draining and assuring that they would become clogged with ice if constantly maintained at a temperature below freezing. An examination of the exhibits offered to prove the structure of these installations shows in each case a horizontal header and horizontal laterals which could not be "self-draining."

The Isabella Furnaces dry blast installation is said to be depicted in plaintiff's Ex. 1 [IV. 1117]. The court will note that the pipe entitled "water spray pipe" appearing near the top of the left-hand figure of this drawing is perfectly horizontal. Further, this pipe runs to another horizontal pipe entitled "6" water header" adjacent the left-hand upper corner of the figure and the bottom of this pipe is below the bottom of the horizontal pipe leading from it through the wall of the building to the pipe labeled "6" pipe" (farthest pipe to left in drawing), which is said to be the drain pipe.

Reference to the drawing of the Mayville plant, plaintiff's Ex. 7 [IV. 1125], shows a horizontal "water pipe for thawing" in the upper part of the left-hand figure, and again, reference to the drawing of the South Chicago Works of the Illinois Steel Company, plaintiff's Ex. 31 [IV. 1153], shows a horizontal water pipe, labeled K in the drawing, entitled "Brine Cooler Building" in the upper right corner as well as a horizontal water pipe, K, L, in the figure "Section A-A." This pipe is shown duplicated seven times in the figure directly above. Concerning these pipes the witness Tominac testified:

"XQ. 215. Now, this drainpipe that you say was over the coils, you say it was horizontal? A. Yes, sir.

XQ. 216. That is, perfectly flat? A. Yes, sir." [II. 530.]

These installations did not embody the McAdam mode of operation. They were not "self-draining" within the meaning of the McAdam patent in suit, and do not anticipate the McAdam invention. Claims 7, 8, 10, 11, 12 or 13 specifically call for the conduits to be "self-draining," and the remaining claims require this in other language.

Not being "self-draining" and not being designed for defrosting while being constantly maintained below the freezing point of water, these Gayley Dry Blast installations clearly have no effect on the validity of the McAdam patent. Besides not being directed at a solution of this problem solved by McAdam, they exhibit one of the objectionable features particularly desired to be overcome by the McAdam invention, *i. e.*, the necessity of closing off and

isolating the refrigerating unit during defrosting. Concerning this the McAdam patent teaches [IV. 1429]:

“Another defrosting method for low temperature work is to provide and periodically operate a system of doors or dampers around the coil which act to temporarily isolate the coil from low temperature air and bring it in contact with a flow of extraneous warm air. This requires locating the coil near one wall of the refrigerated compartment and is also slow and tedious by reason of the low rate of heat transfer from air to ice. Also this method finally brings the coil or heat transfer surfaces to many degrees above freezing, and unless warm air continues to move over the surfaces until they are quite dry the coil will give off warm humid air when again brought into contact with the cold air of the refrigerated space.”

Neither of the alleged dry blast installations contains the combination of devices claimed in the McAdam patent as constituting the patented invention, let alone a combination performing the same functions in the same way. Neither of them contains McAdam's features of novelty. Therefore neither anticipates McAdam's invention. (*Cf. Paraffine Companies, Inc., v. McEverlast, Inc.*, 84 F. (2d) 335 at 339 (C. C. A. 9).)

Failing to disclose each element of a combination comparable to McAdam's combination (functioning in the same way to produce the same results) or failing to solve the problem solved by McAdam, they cannot anticipate McAdam. (*Lincoln Stores, Inc., v. Nashua Mfg. Co.*, 157 F. (2d) 154, 160 (C. C. A. 1) (1946).)

I Ib.

The Patent in Suit Is Not Anticipated by the Polar Ice Co.
Installation at Indianapolis.

This installation was a storage plant of Polar Ice & Fuel Co. designed to house a coin operated ice dispensing machine. Sometime in 1934 it was installed and leased to the witness Martin. Concerning this installation the District Court found [I. 18-19]:

“28. That the installation known as the ‘Polar Ice installation’ and concerning which the depositions were taken in Indianapolis, Indiana, does not anticipate the Letters Patent in suit and does not disclose the invention thereof.

“29. That the installation, the subject matter of the depositions taken in Indianapolis and referred to as the ‘Polar Ice installation’ was not so constructed as to provide for self-draining of the water but, on the contrary, it was established that the pipes were so installed as to prevent self-draining.

“30. That the installation, the subject matter of the depositions taken in Indianapolis and referred to as the ‘Polar Ice installation’ was not used, nor was it adapted for use, within a refrigerated space maintained below the freezing point of water.

“31. The installation, the subject matter of the depositions taken in Indianapolis and referred to as the ‘Polar Ice installation’ was discarded and abandoned and no other like system was ever installed or used by those interested in or instrumental in its construction and attempted use.

“32. The depositions taken at Indianapolis concerning the ‘Polar Ice installation’ do not establish prior invention, manufacture, use or sale of a water

defrosting system anticipating the invention of the McAdam patent in suit.”

These findings are in accord with the overwhelming weight of the evidence.

The evidence is conflicting as to whether this unit was ever operated at below freezing. Martin testified for York Corporation but was not asked concerning this [II. 501-2]. From April, 1936, to the date of his deposition York's witness Simons leased the premises. He testified that the temperature maintained was 33° F. [II. 490, 492]; that he always stored soft drinks such as Coca-Cola in the room [II. 490, 491]; had stored milk there for four years [II. 490]; that this milk never froze [II. 492].

York's witness, Barton, testified that the photograph, Ex. 18 [IV. 1135], correctly shows the original installation [II. 418]. Referring to this exhibit, he states:

“Q. Do you note any other change that was made in this installation? A. I see no other changes from the original installation. That statement was that this entire installation was indelibly imprinted on my mind due to this being such a headache and a source of so much trouble.” [II. 418.]

He also states that the item marked “Y” in Ex. 18 is a water cooler [II. 419]. From the photograph this water cooler is directly under the cold diffuser. This substantiates the testimony of the witness Simons that this room was not operated at below freezing temperatures.

Some of the testimony relates to a necessity for maintaining the room below freezing in order to prevent the blocks of ice from freezing together, but this is refuted by the fact that at 33° F. the witness Simons experienced no such trouble [II. 490].

In the photographs, Exs. 18 and 19 [IV. 1135-1136], the room exhibits great evidence of the wooden walls deteriorating from wet rot [indicated at A-A in Ex. 18 and at W and Z in Ex. 19 [*cf.* Simons' testimony, II. 491]]. Wet rot would not occur in a room maintained below freezing. It was evident when Simons took over in April, 1936, and has become progressively worse ever since [II. 491, 496].

The unit was not self-draining. Inspection of the photograph [Ex. 18, IV. 1135] shows that if the section R-S of pipe A (the water supply pipe) is not slanted downwardly as it progresses from R to S, it is at least horizontal, if not inclined upwardly from S-R. Simons was positive that point L of the waste pipe B was above point M [II. 492, 495]. Further, Simons found that when he tried to water defrost, water stuck in the line at the top of the coil unit. This would indicate that it was not "self-draining" [II. 495].

The most that York Corporation can claim is that there is a conflict in the evidence. Furthermore, even those witnesses who seemed most eager to establish this alleged prior use refused to be positive. For example, the witness Barton stated his testimony could not be conclusive as to maintaining below freezing conditions in the room [II. 431]; the witness Hayes refused to state whether or not the supply and drain lines were so inclined as to be self-draining [II. 457-9].

It is submitted that the overwhelming weight of the evidence is in support of the findings of the District Court. It cannot be disputed that these findings are supported by substantial evidence—every bit of it educed on cross-examination from witnesses testifying for York Corporation. Moreover, it is to be kept in mind that a

very heavy burden of proof rested upon York Corporation to sustain such a defense.

As said by this Court in *Paraffine Companies, Inc., v. McEverlast, Inc.*, 84 F. (2d) 335, at 339 (C. C. A. 9):

“The burden of proof on the issue of prior public use rests heavily upon the party seeking to show such use. Of such a defense the Supreme Court has said: ‘Courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory, and beyond a reasonable doubt.’ *Washburn etc. Co. v. Beat 'Em All Barbed Wire Co.*, 143 U. S. 275, 284, 12 S. Ct. 443, 447, 36 L. Ed. 154.

“To the same effect are *Deering v. Winona Harvester Works*, 155 U. S. 286, 300, 301, 15 S. Ct. 118, 39 L. Ed. 153; *Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 261 U. S. 45, 60, 43 S. Ct. 322, 67 L. Ed. 523; *Rown v. Brake Testing Equip. Corp.* (C. C. A. 9), 38 F. (2d) 220, 223. The rule has been recently restated, perhaps modified, in *Radio Corp. v. Radio Engineering Laboratories*, 293 U. S. 1, 7, 55 S. Ct. 928, 931, 79 L. Ed. 163, where the Supreme Court, speaking through Mr. Justice Cardozo, said: ‘Sometimes it is said that in a suit for infringement, when the defense is a prior invention, “the burden of proof to make good this defense” is “upon the party setting it up,” and “every reasonable doubt should be resolved against him.” (Citing cases.) Again it is said that “the presumption of the validity of the patent is such that the defense of invention by another must be established by the clearest proof—perhaps beyond reasonable doubt.” (Citation.) The context suggests that in these and like phrases the courts were not defining a standard in terms of scientific accuracy or literal precision, but

were offering counsel and suggestions to guide the course of judgment. Through all the verbal variances, however, there runs this common core of thought and truth, that one otherwise an infringer who assails the validity of a patent fair upon its face bears a heavy burden of persuasion, and fails unless his evidence has more than a dubious preponderance.’ ”

Finally, to bolster this alleged Polar Ice & Fuel Co. prior use, evidence was introduced by York Corporation concerning certain correspondence between patent attorneys Goldsmith and Galt and their client Joe Hayes (who did not testify). Concerning this it is sufficient to point out that the entire matter died with the patent attorney’s report [Ex. 27, IV. 1127] suggesting the filing of a patent application. An abandoned application, as such, is no anticipation.

The Corn Planter Patent (Brown v. Guild), 23 Wall. (90 U. S.) 181, 211;

Monarch Marking System Co. v. Dennison Mfg. Co., 92 F. (2d) 90 (C. C. A. 6);

Interurban Ry. & Terminal Co. v. Westinghouse Electric & Mfg. Co., 186 Fed. 166 (C. C. A. 6).

IIc.

The Patent in Suit Is Not Anticipated by the Swift & Company Installation at Elmira.

There were three installations in the Swift & Company plant at Elmira, New York, concerning which testimony was offered. Two of these installations, the sausage room and the pickle room, were equipped to defrost by spraying water over the coils, but were not designed for nor operated at temperatures below the freezing point of water

[III. 644; Smith, II. 668, 670; Fuller, II. 682]. The third room was a below freezing room but admittedly used a different type of defrosting system.

Concerning these installations, the District Court [I. 19-20] found:

“33. The depositions taken at Elmira, New York, concerning the Swift & Company installation do not establish prior manufacture, use, sale or knowledge of the invention of the McAdam Patent No. 2,219,393 in suit.

“34. The depositions taken at Elmira, New York, concerning the Swift & Company installation do not establish the use of a system of water defrosting in a refrigerated space maintained below the freezing point of water.

“35. The depositions taken at Elmira, New York, concerning the Swift & Company installation do not establish that the system was self-draining but, on the contrary, establish that the system as installed and used was not self-draining.

“36. That the depositions taken at Elmira, New York, concerning the Swift & Company installation established that Swift & Company operated a below freezing storage room for holding meat at temperatures below the freezing point of water and that in connection with such installation, Swift & Company did not use the system of water defrosting as disclosed in the McAdam patent in suit, but utilized a different system of defrosting refrigerating coils within the room which required removing all frozen products from the room permitting temperature of the room to rise above the freezing point of water during defrosting.”

These findings are in accord with the overwhelming weight of the evidence.

It is not even contended by York Corporation that the pickle room or the sausage room (the rooms employing water defrosting) were operated at temperatures below freezing [Statement of Counsel, II. 644], but merely that *accidentally* they might go below freezing. Apparently the pickle room did freeze at least once, but what happened? The spray pipe froze up [II. 685] and split [II. 684-5].

While York Corporation did contend that these two suits were self-draining, the accident to the pickle room spray pipe negatives this. Also, the actual physical condition of the pipes disproves it. Thus the witness Smith testified that the water inlet pipes on both units slanted downwardly so that water would be trapped in the pipes between the valves and the water main within the room [see Ex. 38, IV. 1206; Ex. 39, IV. 1207; Ex. 41, IV. 1209; and II. 673].

Further, the witness Van Patten, who held the contract for installing the piping, identified an ordinary gate valve (without such a vent as would be necessary to drain any part of the lines) as the type valve originally installed [II. 697].

Certainly if Swift & Company discovered that these rooms could be operated at a temperature below freezing by making the supply and drain lines self-draining, they would have applied this system to their cold room. But the evidence shows that in that room, which was maintained below freezing, they first removed all of the meat from the room, allowed the temperature to rise and then, in order to defrost, sprayed water from a hose. This

room was then cooled again before returning the meat [II. 675]. No explanation is offered as to why this cumbersome practice was followed under such circumstances. These evidentiary facts fully support the District Court's ultimate finding that neither of these installations discloses the McAdam invention [Finding 33, I. 19].

IIId.

The Patent in Suit Is Not Anticipated by the Abandoned Experiment at Yamhill, Oregon.

Much evidence was offered, both by deposition and by witnesses testifying in open court, respecting a purported prior use at Yamhill, Oregon. This related to the installation in the Trullinger and Eustice store in that city of a locker room and chill room using a Carrier 15 Q-2 diffuser. There is no conflict in the evidence on the point that as originally planned and installed this unit employed the reverse-cycle hot gas method of defrosting, or that as finally operated, it employed the "hot air" method of defrosting. The conflict is with respect to what was employed in the intervening period.

Testimony was offered by York Corporation in the attempt to prove that for a period of time between these two methods, a water defrosting method was employed.

Concerning this, the District Court found [I. 20-22]:

"37. In the depositions taken at Portland, Oregon, and concerning which installation the witness W. C. Hulse, testified before this Court, and referred to as the 'Yamhill installation,' it is not established that said installation was either made, used or sold, or that those taking part in the said installation or use had knowledge of the invention of the McAdam patent in suit No. 2,219,393.

“38. It is established that the said ‘Yamhill installation’ was an abandoned experiment which was never repeated, no like installation was ever made by those interested in this attempted use and did not teach the art the system of water defrost as set forth in the McAdam Patent No. 2,219,393.

“39. In conjunction with the refrigeration machinery installed at Yamhill, Oregon, several different methods of defrosting were attempted unsuccessfully and later abandoned, with the result that the system now utilized at Yamhill, Oregon, was the older system of hot air defrosting requiring the blowing of air over the coils to melt the frost therefrom, which results in a rise in temperature of the refrigerated space.

“40. In conjunction with the different methods of defrosting attempted to be used at Yamhill, Oregon, it is established that during attempts to utilize water for defrosting the refrigerating coils were positioned outside of the refrigerated space.

“41. In conjunction with the several different methods of defrosting which were attempted to be used at Yamhill, Oregon, it is not established that the temperature within the space in which the refrigerating means were operated was maintained below the freezing point of water.

“42. In conjunction with the Yamhill installation, it is established that the attempt to use water for the purpose of defrosting was unsatisfactory.

“43. It is established that the refrigeration machinery installed at Yamhill, Oregon, was not paid for by the owners thereof, Eustice and Trullinger, during the attempt to utilize water for the purpose of defrosting.

“44. While water was attempted to be used at the Yamhill, Oregon, installation, it is established that the refrigerated coils were isolated from the refrigerated space of the Eustice and Trullinger locker room during attempts to defrost the coils thereof by closing doors over the inlet and outlet to the coil containing space with the result that the temperature within the coil housing was not maintained below freezing during defrosting.

“45. In conjunction with the Yamhill installation, it is established that the attempt made to utilize water for defrosting of this system was forgotten by those interested in the installation, that a similar installation was never made at any other place, although the witnesses who testified concerning this attempted installation testified that the problem of defrosting still remained acute after such installation was discontinued.

“46. In conjunction with the Yamhill installation, it is not established when the attempt was made to utilize water for defrosting or when the attempt was discontinued, but it appears that the records of both of these facts were in possession of plaintiff’s witnesses and were not produced by plaintiff.

“47. In conjunction with the Yamhill installation, the Court finds that the witness, W. C. Hulse’s testimony was not worthy of belief and the Court observed his manner and demeanor while giving his testimony before the Court, and his testimony was found to be impeached upon material grounds.”

These findings are fully supported by the evidence. Especially is this true in view of the heavy burden of proof upon York Corporation to establish such an alleged prior use. (*Paraffine Companies, Inc. v. McEverlast, Inc.*, see *ante*, pp. 37-38.)

The testimony of the witnesses called by York Corporation, is hopelessly confused. Witnesses testified that at some unascertained time the hot-gas method of defrosting was purportedly removed and a water defrosting system substituted. This water defrosting unit was supposedly originally in the "chill room," a room maintained at 35-38° F., well above the freezing point of water [Broms, II. 735; Postlewaite, III. 879; and see Proposal Ex. Y-1, IV. 1216]; at some unascertained time an insulated wall was built around it to isolate it from the chill room [Trullinger, III. 770, 782-3; Postlewaite, III. 879; Hulse, III. 938; Ex. Y-28, IV. 1241]. Still later, at another unascertained time, the unit was moved from the chill room and placed in the locker room, and the hot-air method of defrosting substituted [Trullinger, III. 772, 778; Eustice, III. 845]. The evidence of when this alleged changeover to hot air was made was in the possession of the witness Trullinger, but no explanation of the failure to offer it is made [III. 795].* The unit was admittedly unsatisfactory at least two separate times in its state of development and payment therefor refused by the purchasers [Broms, II. 708; Trullinger, III. 759, 770, 782-3; Eustice, III. 845, 850; Postlewaite, III. 894]. There is no clear-cut evidence that the unit was ever paid for, even subsequent to the changeover to hot-air defrosting [III. 767, 787].

*** * * it has always been the law that where knowledge and means of proof with respect to an issue are peculiarly within the power and control of one of the parties, the burden of proof is, to that extent, placed upon him, although it would otherwise rest upon his adversary." (*Kalo Inoculant Co. v. Funk Bros. Seed Co.*, 161 F. (2d) 981, at 989 (C. C. A. 7) (citing cases).)

At least two witnesses unqualifiedly state that the unit was always unsatisfactory. Eustice admitted this [III. 845, 850]. They couldn't make it work [Postlewaite, III. 894]. And the man in charge of the company who installed the unit stated that even when it seemed to have cleaned off the top of the coils, there would be large blocks of heavy, glazed ice on the lower side [III. 1077]. His company lost money on the job, due to continuous service charges caused by defrosting problems [III. 1075-6].

There is no dispute about the fact that the alleged water defrosting was torn out and none of those associated with it ever attempted to build another unit like it. [Broms, II. 738; Hulse, III. 965; Dahl, III. 1078.]

The evidence further shows that this Yamhill installation not only was an unsuccessful, abandoned experiment, as the District Court was impelled to find from the evidence, but did not embody the McAdam invention.

While the unit was in the chill room it was not within a refrigerated space constantly maintained below the freezing point of water [II. 735, III. 879, IV. 1216]. The witness Postlewaite unequivocally testified to the fact that prior to enclosing the unit with insulating walls, it was above freezing during defrosting [III. 892]. Like the Elmira installation heretofore discussed, such installation did not involve the problem solved by the McAdam invention, and cannot anticipate it.

The evidence of what was done when an insulated wall was built around the unit to shield it from the chill room is again hopelessly confused. The witness Broms recalls no doors or vanes for shutting this enclosure off from the cold room; *i. e.*, the locker room, but won't say there were none [II. 735]. The witness Hulse says there was a vane

on the lower opening, the intake from the locker room, but none on the upper outlet [III. 945]. Postlewaite testified there was a door on each [III. 893], and Trullinger, who owned and operated it, testified that not only was there a door on each but during defrosting these doors were closed *to keep the cold from the locker room from coming in*, and that the water would freeze if you did not [III. 779-80, 797-8, 810]. In fact, Trullinger testified on cross-examination that you couldn't defrost the unit until it was enclosed [III. 782-3] and then later repudiated this [III. 820].

No witness testified to the temperature of the insulated compartment during defrosting. It was closed off from both the cold locker room and the 35° F. chill room and "the cold kept out."

The witness Hulse testified to ice being in this chamber [III. 937, 965-6], but he was thoroughly impeached and found not worthy of belief [Finding 47, I. 22]. The District Judge found it necessary to caution him to quit trying "to outfigure counsel and the court" [III. 968]. Two witnesses testified to a conversation (which Hulse denied having [III. 951-2]) wherein Hulse admitted this installation wouldn't work [III. 1065-7, 1071, 1095]. Further, Hulse's attempt to solicit the testimony of the witness Dahl to whom he stated "it meant considerable to him" indicated his bias [III. 1082-4].

If the court could accept the testimony of Trullinger and Postlewaite, there were doors to isolate the chamber from the cold room during defrosting. The doors were closed during defrosting to keep out the cold air from the locker room [III. 779-80, 797-8, 810], and the isolated unit was permitted to warm up during defrosting. In fact, if this were not done it would freeze [III. 797-8].

Therefore, it is clear that this unit was not, and could not be, maintained below freezing during defrosting. We have heretofore pointed out that one of the objects of the McAdam invention is to defrost at below freezing temperatures without the necessity of closing off and isolating the refrigerating unit during defrosting.

In summary, then, with respect to this alleged Yamhill prior use:

It was an unsatisfactory, unsuccessful experiment;

It was abandoned and never revived;

It was not constantly maintained below the freezing point of water and, hence, did not involve the McAdam invention; and

It involved walls and vanes isolating the refrigerating unit, a defect which it is one of the objects of the McAdam invention to avoid.

As pointed out, the District Court made detailed findings on each of these issues. Material to these findings was the testimony of the witness Hulse and the impeaching testimony of the witnesses Wilde, Dahl and Jarvis, all given in open court. On these issues RCP 52 is particularly applicable:

“* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *”

As said by this court in *Wittmayer v. United States*, 118 F. (2d) 808, 811 (C. C. A. 9):

“The findings of the trial court fall within the familiar rule, that where based upon conflicting evidence they are presumptively correct, and unless some

obvious error of law, or mistake of fact, has intervened, they will be permitted to stand. *Silver King Coalition Mines Co. v. Silver King C. M. Co.*, 8 Cir., 204 F. 166, 177, Ann. Cas. 1918B, 571.

“The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong (Rule 52(a), 28 U. S. C. A. following section 723c), is but the formulation of a rule long recognized and applied by courts of equity. *Guilford Const. Co. v. Biggs*, 4 Cir., 102 F. 2d 46, 47.

“As was said by Mr. Justice Holmes in *Adamson v. Gilliland*, 242 U. S. 350, 353, 37 S. Ct. 169, 170, 61 L. Ed. 356 (citing *Davis v. Schwartz*, 155 U. S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289), the case is pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses ‘depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding it must be treated as unassailable.’ ”

See also:

United States v. Protsch, et al., 137 F. (2d) 92 (C. C. A. 10);

Gary Theatre Co. v. Columbia Pictures Corporation, 120 F. (2d) 891 (C. C. A. 7).

The evidence before the court is clearly insufficient to establish that the McAdam invention is anticipated by this Yamhill installation.

Upon substantial evidence it was found to have been an unsuccessful, abandoned experiment.

This court has announced the applicable rule of law in *Consolidated Contract Co., et al., v. Hassam Paving Co., et al.*, 227 Fed. 436, at 441 (C. C. A. 9), wherein the court said:

“* * * The experiment was not satisfactory, but, as the witness said, ‘demonstrated that I might have something of practical value, but that I had not carried it far enough, or experimented enough at length, to demonstrate its practical value.’ The pavement laid by McClintock was never used elsewhere or tried again. We agree with the learned judge of the court below that McClintock’s venture comes clearly within the category of an abandoned experiment, which is not sufficient in law to anticipate a successful patent. * * *”

Again, as said by the Circuit Court of Appeals, Second Circuit, in the recent case of *Picard v. United Aircraft Corporation*, 128 F. (2d) 632, at 635:

“* * * It is also true that another’s experiment, imperfect and never perfected, will not serve either as an anticipation or as part of the prior art, for it has not served to enrich it. The patented invention does not become ‘known’ by such a use or sale, or by anything of which the art cannot take hold and make use as it stands. But the mere fact that an earlier ‘machine’ or ‘manufacture,’ sold or used, was an experiment does not prevent its becoming an anticipation or a part of the prior art, provided it was perfected and thereafter became publicly known. Whether it does become so depends upon how far it becomes a part of the stock of knowledge of the art in question. * * *”

Or as stated in *Pyrene Mfg. Co. v. Boyce*, 292 Fed. 480, at 485-6 (C. C. A. 3):

“* * * In considering the several alleged prior uses set up by the respondent, we do not find that, within the authority of *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504, they were ‘so far understood and practiced or persisted in as to become an established fact, accessible to the public and contributing definitely to the sum of human knowledge.’ ”

See also, *Radio Corporation of America v. Mackay Radio & Telegraph Co., Inc.*, 96 F. (2d) 587, 591 (C. C. A. 2).

IIe.

The Patent in Suit Is Not Anticipated by U. S. Patent No. 2,097,851 to Wenzl or the French Patent No. 800,640, of 1936, to Jensen & Roser.

In its points of appeal [III. 1111] York Corporation has alleged that the District Court erred in not holding that the use of water to defrost at below freezing temperatures was taught by the prior Wenzl patent No. 2,097,851 [IV. 1272] and the Jensen & Roser French Patent No. 800,640 [IV. 1279].

Each of these patents fails to anticipate the patent in suit. Neither of them teaches the use of water for the defrosting of the refrigerator coils located in a space required to be constantly maintained below the freezing point of water.

The patent to Wenzl clearly does not anticipate the McAdam patent. No conduits for supplying water to the spray pipe or for draining the water from the unit are shown in this patent. Clearly, then, it does not antici-

pate the McAdam patent which is specifically limited to such self-draining conduits.

Further, while this Wenzl patent states that the outer surfaces of its cooling elements must never be higher than 0° (presumably Centigrade, the patentee being a German), no statement whatsoever is made concerning the temperature during defrosting. It is noted that the patent is stated to relate "to air coolers for effecting the lowering of temperature in rooms, public buildings, etc., in storage rooms, such as the cellars of breweries, rooms where perishable goods are kept." [p. 1, col. 1, ll. 1-5 of the Wenzl Patent, IV. 1275.]

It is obvious that such places as public buildings, cellars of breweries, etc., are not spaces continuously maintained below the freezing point of water. The temperature of the surface of the refrigerating coils therein is not proof of the temperature of the surrounding space. It is precisely upon this point, *i. e.*, the temperature during defrosting, that the problems solved by McAdam arise. The Wenzl patent being completely silent in this regard, therefore, cannot be an anticipation.

It is well settled that an indefinite prior patent cannot anticipate, *Ideal Roller & Mfg. Co. v. Sutherland Paper Co.*, 96 F. (2d) 675 (C. C. A. 6), and that a prior patent, in order to be an anticipation, must itself speak; its specification must give in substance the same knowledge and the same directions as the specification of the patent in suit, *Southern Phosphate Corporation v. Phosphate Recovery Corporation*, 102 F. (2d) 801 (C. C. A. 3). A patent which fails to solve the problem towards which the inventor's efforts are directed does not anticipate a patent which successfully solves a problem and effectively

accomplishes the desired result, *Williams Iron Works Co. v. Hughes Tool Co.*, 109 F. (2d) 500 (C. C. A. 10).

In failing to mention anything concerning temperature during defrosting the Wenzl patent fails to approach the problem solved by McAdam. This Wenzl patent, therefore, does not bear within its four corners adequate directions for the practice of the invention of the McAdam patent. It therefore clearly fails to anticipate the McAdam patent, *Devey & Almy Chemical Co., et al., v. Mimex Co., Inc.*, 124 F. (2d) 986 (C. C. A. 2).

The French patent to Jensen and Roser likewise fails either to teach the use of water for defrosting a coil located in a space constantly maintained below the freezing point of water or to anticipate the McAdam patent. This French patent is very indefinite in its disclosure. The only thing said concerning defrosting is at IV. 1282, middle paragraph, wherein it is suggested that "whenever defrosting becomes necessary such operation may be readily effected either by a current of air obtained from outside the cooling chamber or by means of a circulation of water." The full text is:

"Whenever defrosting becomes necessary, such operation may be readily effected either by a current of air obtained from outside the cooling chamber or by means of a circulation of water. The stream of air or water passes through pipe 16 disposed above the container 2. This pipe is pierced with openings to permit the air or water to flow uniformly through the container and its pipes and into its passages."
[IV. 1282.]

It is impossible to determine from this French patent how a "circulation of water" could be established. The water is presumably sprayed from the header formed by

the coil of pipe 16. This circle is outside the container 2 and the water would, therefore, be sprayed outside the container 2 and not upon the tubes forming the container. This water would flow downwardly and out of the pipe 18 and could not flow upwardly through the tubes and defrost them. All, therefore, that this patent contains is a mere "prophetic suggestion" as to what might be done with a circulation of water.

Nothing is better settled in the law than that such vague foreign patents cannot have effect as anticipating an invention patented in a United States patent.

This court, in *Carson v. American Smelting & Refining Co.*, 4 F. (2d) 463, 465 (C. C. A. 9) says:

"A foreign patent is to be measured as anticipatory, not by what might have been made out of it, but by what is clearly and definitely expressed in it. An American patent is not anticipated by a prior foreign patent, unless the latter exhibits the invention in such full, clear, and exact terms as to enable any person skilled in the art to practice it without the necessity of making experiments. *Seymour v. Osborne*, 11 Wall. 516, 555, 20 L. Ed. 33; *Hanifen v. Armitage* (C. C.) 117 F. 845; *Permutit Co. v. Harvey Laundry Co.* (C. C. A.) 279 F. 713; *General Electric Co. v. Hoskins Mfg. Co.*, 224 F. 464, 140 C. C. A. 150. In *Westinghouse Airbrake Co. v. Great Northern Ry. Co.*, 88 F. 258, 31 C. C. A. 525, the court said: 'The prophetic suggestions in English patents of what can be done, when no one has ever tested by actual and hard experience and under the stress of competition the truth of these suggestions, or the practical difficulties in the way of their accomplishment, or even whether the suggestions are feasible, do not carry conviction of the truth of these frequent and vague statements.'"

As said by the Supreme Court in *Seymour v. Osborne*, 11 Wall. (78 U. S.) 516 (1871):

“Patented inventions cannot be superseded by the mere introduction of a foreign publication of the kind, though of prior date, unless the description and drawings contain and exhibit a substantial representation of the patented improvement in such full, clear and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct and practice the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent. Mere vague and general representations will not support such a defense, as the knowledge supposed to be derived from the publication must be sufficient to enable those skilled in the art or science to understand the nature and operation of the invention, and to carry it into practical use. Whatever may be the particular circumstances under which the publication takes place, the account published, to be of any effect to support such a defense, must be an account of a complete and operative invention capable of being put into practical operation.”

See also *Wisconsin Alumni R. Foundation v. George A. Breon & Co.*, 85 F. (2d) 166 (C. C. A. 8) (1936).

Like the Wenzl patent, this French patent is utterly silent as to the temperature conditions of the unit while defrosting. This French patent fails to approach the problem solved by McAdam and can have no effect upon the validity thereof.

“* * * The record shows that the various parts of Carroll’s device were so interrelated and so co-acted as to bring about the desired result in an

eminently successful and satisfactory manner, and we see nothing in the record to show that any other device or apparatus ever before operated upon the same principle in accomplishing the same or a similar result. A device which does not operate on the same principle cannot be an anticipation. * * *” (*Los Alamos Sugar Co. v. Carroll*, 173 F. 280 at 284 (C. C. A. 9)).

III.

The McAdam Patent Is for a Combination. Defense of Anticipation Must Be Addressed to the Combination.

Appellants have fallen into the error to which all defendants in patent litigation are prone, for it is well established that it is not sufficient to show that each of the elements of a patented combination are separately old, but it is necessary to show *the combination* is old. The Circuit Court of Appeals, Sixth Circuit, in *Yesbera v. Hardesty Co.*, 166 Fed. 120, 125, has expressed this very aptly when it said:

“* * * The point to be emphasized is that the law looks not at the elements or factors of an invented combination as a subject for a patent, but only to the combination itself as a unit distinct from its parts,
* * *.”

It is a well settled principle of patent law that:

“* * * It is not sufficient to constitute an anticipation, that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions.” (*Topliff v. Topliff*, 145 U. S. 156, 161.)

In *Western Electric Co. v. Home Telephone Co.*, 85 Fed. 649, the court, in discussing this principle of law, said at 656:

“The force of this ruling, and the similar ruling in *Clough v. Barker*, 106 U. S. 175, 1 Sup. Ct. 188, is made manifest, in its practical application to the rights of parties, by the reflection that all earlier patents set up in defense against a later patent sued upon are but the record evidence of the status the art has reached. The rights under such later patent are subject to what this record evidence *actually shows*. To change this record, by permitting theoretical modifications of these earlier patents, would be the same, in principle, as to change, by interpolation or modification, any other evidence between the parties.” (Emphasis supplied.)

This rule is well established.

See:

Gunn v. Bridgeport Brass Co., 148 Fed. 239;

Tubelt Co. v. Friedman, 158 Fed. 430;

Tannage Patent Co. v. Zahn, 70 Fed. 1003 (C. C. A. 3);

Ryan v. Newark Spring Mattress Co., 96 Fed. 100;

Simonds R.-M. Co. v. Hathorn Mfg. Co., 90 Fed. 201, 208;

Gormully & J. Mfg. Co. v. Stanley Cycle Mfg. Co., 90 Fed. 279.

IV.

The York Corporation's "Unit Sold to Private Concerns" Infringes Claims 1, 2, 5, 6, 7, 8, 12 and 13* of the Patent in Suit.

The parties entered into a stipulation concerning the manufacture and sale to private citizens by the York Corporation of the refrigerating apparatus as described in the stipulation [Defts. Ex. CC, IV. 1527].

This unit as therein described [particularly at pages 1528-1529 of the transcript] embodies each and every element of each of the claims alleged to be infringed. This is immediately apparent from the claim charts [IV. 1538] offered in evidence by Refrigeration Engineering, which clearly illustrate the manner in which the York Corporation unit embodies the elements of the claims. York Corporation has never argued that its unit failed to respond to the claims of the patent in suit, but has predicated its argument of noninfringement on the suggestion that it does not supply one element of the claims, to-wit, the refrigerated space. This argument is not open to York Corporation. The stipulation clearly provides that York Corporation has supplied water defrosting connections with its standard section coil unit where the unit was installed to maintain the temperature well below freezing in the refrigerated space [IV. 1528].

In describing the units it has sold, the stipulation particularly refers to this "refrigerated space" [IV. 1529].

The stipulation, therefore, fully establishes infringement. No request for relief from the stipulation has ever been made. The stipulation is clearly binding upon the litigants. York Corporation's argument with respect to noninfringement is therefore clearly without merit.

*No charge of infringement of claims 3, 4, 9, 10, 11 or 14 was presented to, litigated or adjudged in the District Court.

V.

The District Court Erred in Concluding That Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 14 of the Patent in Suit Failed to Define the Entire Invention of the McAdam Patent.

York Corporation's declaratory judgment complaint alleged the total invalidity of the McAdam patent [I. 3, par. VIII]. The District Court adjudged the enumerated claims invalid as failing to define the complete invention [I. 24, par. 3; *cf.* Finding 48, I. 22; Conclusion 3, I. 23]. In this the court erred. Each of these claims definitely claims a combination and sufficiently points out and distinctly identifies each of the elements of the combination claimed by the claim.

It is to be noted that claims 2-6, inclusive, are dependent upon claim 1 and include all of the elements of claim 1, together with an additional element or elements. One element of each of these claims 1-6 is "a refrigerated space" [IV. 1432, col. 1, line 5]. The McAdam patent fully describes and discloses what is therein referred to as "a refrigerated space." The first sentence of the patent states "My invention relates to low temperature refrigeration where *a space is required to be constantly maintained at temperatures below the freezing point of water*, * * *" [IV. 1429, col. 1, lines 1-4; emphasis supplied]. The refrigeration coil is described [*id.*, 1430, col. 1, line 70, to col. 6, line 6], and it is stated: "While the scale of the drawings does not permit of showing a large compartment, the walls of such box or compartment are in part shown and indicated at 9, * * *" etc. [*id.*, line 7 *et seq.*]. This is the chamber which "is required to be constantly maintained at temperatures below the freezing point of water, * * *" just referred to. Each of these

claims also includes “valve means connected with * * *”
“a valve-controlled conduit.”

It is not apparent from the record herein upon what the District Court founded its conclusion that these claims failed to define the complete invention. The District Court did not find anticipation or want of invention. We must therefore await such criticism of the claims’ definition by York Corporation. The Refrigeration Engineering counsel are unable to find anything lacking in these claims or to understand what the District Court depended on as constituting the invalidity.

Claims 7 and 8 call for a combination of which “a refrigerated space” is one element. A self-draining water supply conduit is another element. The elements are clearly identified and specified. Claims 9, 12 and 14 are for combinations. Each of the elements is specified definitely and their inter-relation and purposes is set forth.

In claims 10 and 11 the combination is specifically limited to “a refrigeration space” which, after the recital in the claims of other elements, is referred to as follows: “* * * whereby the air of said refrigerated space does not rise above the freezing point of water during the time required for defrosting said coil and fin surfaces, * * *” [IV. 1432, col. 2, lines 8-11]. These claims also call for the self-draining conduits.

If the District Court’s objection to these claims was founded upon an asserted failure of these claims to specifically call, in so many words, for a refrigerated space *constantly maintained below the freezing point of water*,

the court clearly erred. The McAdam patent clearly states that it relates to refrigeration where a space is required to be constantly maintained at temperatures below the freezing point of water. Particularly, it would appear that the District Court overlooked the specific disclosure in claims 10 and 11 of the refrigerated space and the statement "whereby the air of said refrigerated space does not rise above the freezing point of water," etc.

The rule of interpretation is that the claims of a patent are to be construed in the light of the specification in order to secure to the inventor his real invention (*Deller's Walker on Pats.*, Vol. II, §261, p. 1242, and cases cited).

This Court has repeatedly applied this rule (*Henry v. City of Los Angeles*, 255 Fed. 769, 780 (C. C. A. 9); *McRoskey v. Braun Mattress Co.*, 107 F. (2d) 143 (C. C. A. 9)). In the last case cited, this Court pointed out that the only type of spring referred to in the specification of the patent in suit was a conical spring and therefore construed the claims as being limited to conical springs. In this case the only type of refrigerated space mentioned in the McAdam patent is a refrigerated space maintained constantly below the freezing point of water. Applying this rule, as in the *McRoskey* case, the claims are to be construed as limited to a refrigerated space constantly maintained below the freezing point of water and therefore clearly as defining the true McAdam invention (cf. *Carnegie Steel Co. v. Cambria Iron Works*, 185 U. S. 403, 432; *Oliver-Sherwood Co. v. Patterson-Ballagh Corp.*, 95 F. (2d) 70, 78 (C. C. A. 9)).

VI.

The District Court Did Not Err in Denying Plaintiff's Motion to Amend Its Complaint.

York Corporation, toward the close of the trial [III. 1053], made a belated motion to amend its complaint to state that "defendant is barred from the relief sought in the McAdam patent because it has misused the patent in an effort to control competition on unpatented devices." [III. 1053.] The District Court denied this motion [III. 1060, 1061, 1063]. There was no abuse of discretion in so doing. This alleged defense is predicated upon the doctrine laid down by the Supreme Court of the United States, particularly in *Mercoïd Corporation v. Mid-Continent Investment Co.*, 320 U. S. 661. In that case the court held that the owner of a patent on a combination could not enforce the patent where he was not manufacturing and selling the combination, but only one element thereof. York Corporation's position is that this doctrine is applicable here because Refrigeration Engineering, Inc., does not sell with its units the length of hose required to form a portion of the supply conduit and the drain conduit [III. 1100, 1101], and on the assertion by York Corporation that Refrigeration Engineering, Inc., does not sell "a refrigerated space." The testimony is clear that Refrigeration Engineering, Inc., has sold the hose and hose connections [III. 1100] and that other than omitting the length of hose in its current sales, it supplies the entire unit [III. 1100]. There is no other evidence as to how Refrigerating Engineering, Inc., does business. Accordingly, there was no evidence upon which the Court

could conclude that Refrigeration Engineering, Inc., was misusing the patent in suit. The motion was therefore denied because the proofs did not establish facts constituting patent misuse under this *Mercoïd* decision.

Conclusion.

It is respectfully submitted:

(1) That the judgment of validity and infringement of claim 13 should be affirmed;

(2) That it is clear that each of claims 1-12, inclusive, and 14 clearly defines the combination of elements therein described and set forth with due particularity sufficiently to enable the court and one skilled in the art to identify such elements; that this is the maximum requirement as to sufficiency of definition in a claim; that the judgment should be reversed in so far as it adjudges that these claims "are invalid and void as failing to define the entire combination of the invention of the McAdam patent";

(3) That claims 1, 2, 5, 6, 7, 8, 9, 10 and 12 are clearly infringed by plaintiff-appellant; that the appealed judgment should be modified by inserting such a judgment therein; that the perpetual injunction provided for in said judgment be extended to and include these claims; and that paragraph VIII [I. 25-6] should be amended to include recovery of general damages, etc., under these claims;

(4) That the District Court did not err in denying York Corporation's belated motion to amend its complaint and to plead an alleged patent misuse by Refrigeration

Engineering, Inc.; that there has been no patent misuse by Refrigeration Engineering, Inc.; and

(5) That appellee and cross-appellant, Refrigeration Engineering, Inc., recover its costs and disbursements incurred upon these appeals.

Respectfully submitted,

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 11642

REFRIGERATION ENGINEERING, INC., a Corporation,
Appellant,
vs.

YORK CORPORATION, a Corporation,
Appellee,
and

YORK CORPORATION, a Corporation,
Appellant,
vs.

REFRIGERATION ENGINEERING, INC., a Corporation,
Appellee.

BRIEF ON BEHALF OF YORK CORPORATION

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

REFRIGERATION ENGINEERING, INC., a
Corporation,

Appellant,

vs.

YORK CORPORATION, a Corporation,
Appellee,

and

YORK CORPORATION, a Corporation,
Appellant,

vs.

REFRIGERATION ENGINEERING, INC., a
Corporation,

Appellee.

No. 11642

BRIEF ON BEHALF OF YORK CORPORATION

Plaintiff, York Corporation, brought this action January 8, 1945, seeking a declaratory judgment that the McAdam patent No. 2,219,393 was invalid and that plaintiff did not infringe any of the fourteen claims of this patent. In its answer defendant*, Refrigeration Engineer-

* Since there are cross-appeals and reference to the parties as "plaintiff" and "defendant" tends to some confusion, we will refer to the plaintiff as "York" and to the defendant and patent owner as "Refrigeration."

Emphasis in quotations is ours unless otherwise stated.

ing Incorporated, the patent owner, included a counterclaim charging infringement of the McAdam patent by York, to which York filed an answer, denying validity and infringement.

Jurisdiction of the Court under the Declaratory Judgment Statute and the Patent Laws* is alleged in paragraphs I-VI of the Complaint (R. 2-3) and is admitted in paragraph I of the Answer (R. 7).

The trial was conducted before Judge Peirson M. Hall in the United States District Court for the Southern District of California, Central Division, from September 17 to 26, 1946. The next day the trial judge delivered his opinion orally from the bench, immediately following oral arguments by counsel for York and Refrigeration, and without benefit of briefs, adjudging Claim 13 of the McAdam patent valid and infringed and all other claims invalid.

The Court's entire opinion was as follows (R. 12):

"The Court: From the evidence, and from the law, as I understand it, I think that claim 1 is void, and 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 14. I think 13 is the only claim which has the entire combination for constantly maintaining temperatures in a room below the freezing point of water, and is valid, and that will be the judgment of the court.

"As to infringement, I think that I will have to hold that the patent was infringed by the plaintiffs, because if you are correct in your contention concerning infringement, then no claim of the patent would be valid, and I have held claim 13 valid, because it is the only claim which describes all of the elements of the combination. For that reason I will hold that the patent has been infringed."

Both parties submitted proposed findings of fact, conclusions of law, and judgments, and Judge Hall adopted *verbatim* those of Refrigeration (R. 13-26). Both parties have appealed from Judge Hall's decision (R. 27-28).

* The pertinent portions of the statutes are printed in the Appendix, pages 77-80.

York's Statement of the Case

The McAdam patent (R. 1428-32) is for a device or apparatus. It is for a combination of old elements. These elements consist of cooling apparatus; means for spraying water over the cooling coils to remove the accumulated frost on the coils; pipes and valves for bringing in and draining away the defrosting water; all in combination with the room or space which the cooling apparatus serves to refrigerate.

It is admitted by Refrigeration that all of the parts of the apparatus patented are old and that therefore the invention, if any, must reside in the *combination of those old parts* (R. 259).

It is York's position that

(1) All of the claims of the McAdam patent are invalid for anticipation and for lack of invention

(a) because of five instances of prior public knowledge and use, and one instance of prior public knowledge and sale, of the same combination of old parts (*infra*, pp. 18-45):

The Gayley prior public use installations at
Pittsburgh, Chicago and Mayville, Wis.;

The Polar Ice and Fuel Company sale at Indianapolis;

The Swift & Co. installations at Elmira, N. Y.;
and

The Trullinger & Eustice installation at Yamhill, Oregon;

(b) because of prior patents and publications showing the same combination of old parts (*infra*, pp. 50-52).

These points are raised in the complaint (R. 3-5) and in York's Points 1, 7-12, 15-19 on appeal (R. 1109-13).

(2) All of the claims are invalid for lack of invention, and since all the elements in the combination perform their old functions in their normal and well-known manner (Point 3, R. 1109), the claims are invalid because they are merely for an aggregation of old elements.

(3) If, as contended by Refrigeration, the only distinguishing feature between McAdam's device and the prior devices is that the latter were not used in below freezing temperatures, then his alleged invention would lie merely in the new use of an old apparatus, which is not patentable (Point 3, R. 1109).

(4) Refrigeration is barred from relief in this suit because it has "misused" the McAdam patent in an effort to control competition in unpatented devices (R. 1053-63).

(5) York denies infringement (R. 10; Point 2, R. 1109) on the ground that, even if valid, none of the claims of the McAdam patent is infringed because York has not sold the entire combination of any of the McAdam claims. York has sold neither the "refrigerated space" nor "finned coils" nor "an electrically operated valve means", which are important elements of the combination.

Specification of Errors

The District Court erred:

1. In sustaining the validity of claim 13*, and in not holding all the claims invalid

a) because of the six instances of prior public knowledge, use or sale proved by the depositions of twenty-five witnesses and many documents (*infra*, pp. 18-45), its Findings 20-47 and Conclusion 2 (R. 17-23) on this subject being wholly erroneous and not supported by evidence;

* See p. 7 *infra* for the text of claim 13.

b) because the claims were anticipated by the prior patents and publications (*infra*, pp. 50-52), its Findings 17 and 19 to the contrary being erroneous;

c) because there was no invention in the combination claimed in view of the state of the art (*infra*, pp. 56-67), its Findings 6-10 and 18 to the contrary being based upon meager and incompetent testimony against the great weight of the testimony of eighteen witnesses; its Findings 11-16 in regard to commercial success not being warranted by the evidence (*infra*, pp. 59-67).

2. In holding claim 13 valid because it "has the entire combination for constantly maintaining temperatures in a room below the freezing point of water," (R. 12) and ignoring the fact that Refrigeration was estopped from urging that such limitation existed (R. 1368, 1372, 1408-9, 1413-4); and in any event it erred in not holding that such limitation imparted no patentability to the claim.

3. In reaching a conclusion of infringement of claim 13 (Conclusion 4, R. 23):

a) by misapprehending York's argument of non-infringement, the Court stating "I will have to hold that the patent was infringed by the plaintiffs, because if you are correct in your contention concerning infringement, then no claim of the patent would be valid, and I have held claim 13 valid * * *" (R. 12);

b) by failing to appreciate and in not finding that York did not sell the "refrigerated space," nor "finned coils" nor "an electrically operated valve means," which are important parts of the patented combination, and that therefore it did not sell the apparatus of the patent and could not infringe claim 13 (*infra*, pp. 12-13, 67-68);

c) by failing to make any finding of fact as to what devices York sold, or any finding to support its conclusion of infringement of claim 13.

4. In denying York's motion to amend its complaint to include the charge and defense of misuse by Refrigeration

tion of its patent (R. 1063), and in not finding that Refrigeration did misuse its patent and was therefore barred from recovery in this suit (*infra*, pp. 69-74).

5. In its Conclusions 5 and 6 (R. 23), in granting Refrigeration costs and counsel fees and in not dismissing Refrigeration's cross-complaint and granting the prayers of York's complaint.

I. The McAdam Patent

Before discussing the McAdam patent, the cycle of operation of a refrigeration machine will be described. A refrigeration machine of the type shown in the McAdam patent gets its cooling effect by allowing a volatile liquid having a low boiling point to evaporate in the refrigerating or "evaporator" coils. This action of changing state from liquid to gas absorbs heat so that the coil becomes cold. A "compressor" continually takes this gas away so that more liquid will evaporate. The compressor compresses the gas so that it may be turned back to the liquid state in the "condenser." The liquid is then returned to the "evaporator" coil to vaporize and resume the process of absorbing heat (R. 988, 990).

Since the evaporator coils are at a low temperature, the moisture contained in the air of the refrigerated space which passes over the coils condenses on the coils, forming frost. The frost, acting as an insulator, impairs the efficiency of the coils and must be periodically removed.

What McAdam claims as his invention is an *apparatus* consisting of a refrigerated space, evaporator coils, and a supply conduit to conduct water to a spray head from which it is sprayed over the coils, and a drained drip pan to conduct the sprayed water out of the refrigerated space. McAdam provided in the supply conduit at a point outside the refrigerated space an ordinary "three way" or "stop and waste" valve which allowed water to enter the pipes and, upon closing the valve, allowed the water in that part

of the supply conduit which was inside the refrigerated space to drain back through the valve.

The operation of the McAdam apparatus may be best understood by referring to the patent drawings (R. 1428). The "three way" valve is shown at the left of Fig. 2. In the position shown in the drawing the valve is seated so as to shut off the drain port 19 and leave the other two ports 20 and 21 open, which allows the supply water to enter the valve at port 21, leave at port 20 and flow through the inclined supply conduit 17, to the pan 14. The water then flows through the perforations 15 in the bottom of the pan and runs over the coil 5. Water at any temperature above freezing will serve to cause the frost and ice to melt from the coil. The melted ice and water collect in the drip pan 8 below the coil 5 and waste through the inclined drain pipe 12. When all the frost has been removed from the coil, the water is shut off by adjusting the valve stem 25a so that the port 21 is closed and port 19 is opened. Water remaining in the spray pan 14 and the supply conduit 17 is then free to drain back through the conduit 17a. During the defrosting operation the fan 6 and the compressor are stopped.

Claim 13, the only claim held valid, is as follows:

13. In combination with a *refrigerated space*, a *coil* adapted for periodic defrosting, a *spray-head* positioned to distribute water over said coil for defrosting thereof, a *fan* to move air of said space over said coil adapted to be discontinued during defrosting periods whereby the air of said space does not rise above the freezing point of water during the defrosting period, a *drip pan* disposed below said coil to receive water and ice gravitating from said coil, a *self-draining conduit* leading from said drip pan to points remote from said space, and an *inclined water supply conduit* leading from a point remote from said space to said spray-head; said water supply conduit at said remote point provided with an opening normally open to the atmosphere [through a valve] whereby the conduit and spray-head re-

spectively are self-draining, and *means* [a valve] *for periodically supplying water* to said supply conduit during period when said fan is inoperative.

The other claims vary slightly in language, but they are all for an apparatus consisting of a combination of old parts.

As will be seen from claim 13, and as admitted by Refrigeration's patent expert Doble (R. 260), the patent is for an "apparatus", a device, and not for a method or a manner of using an apparatus. It is for the mechanism itself.

Part of that mechanism consists of a concentrated refrigeration coil with a fan to blow the air through the coil. This type of compact blower refrigeration unit was not new with McAdam (R. 1430, col. 1, ll. 22-9; 258); York sold many of such blower units long prior to McAdam (R. 997-9; Plff's Ex. 106, R. 1301-2, showing photographs of such units).

Another part of that mechanism is the means for defrosting the coil. McAdam was not the first to introduce defrosting means in a blower type unit, for the blower type units sold long prior to McAdam had various forms of defrosting either by means of warm air circulated over the coils (R. 1008-9), or warm gases introduced into the coils from the compressor (R. 1018), or by spraying over the coils in a continuous or intermittent stream water containing a salt solution (R. 1016), the salt aiding to dissolve the frost (R. 1022). In those instances where the water was recirculated from a pan directly beneath the unit and within the refrigerated space the salt solution kept the water lying in the pan from freezing (R. 1036).*

Nor can it be claimed that the idea of plain water defrosting was new with McAdam. That ordinary tap water

* These forms of defrosting are still by far the most commonly used; only 11% of the units sold by York since 1940 use water defrosting (R. 1032). Refrigeration, which specializes in water defrosting, sells only 40% of its coils with water defrosting (R. 1093). The type of defrosting used is an engineering matter depending upon the nature of installation, kind of refrigerant used, and product to be refrigerated (R. 1020, 1021, 1024).

contains enough heat* to melt ice and frost from refrigeration coils was known long prior to McAdam by every housewife who ever poured water over the coils in a household refrigerator in order to remove frost. And that such water could be used in a below freezing atmosphere without itself being lowered below the freezing point was also known prior to McAdam. This is disclosed in at least two prior patents (Wenzl, R. 1271; Jensen & Roser, R. 1279, *infra*, pp. 51-2), and water was thus used in the instances of prior use and sale proved in this case by deposition (*infra*, pp. 16-47).

There is nothing surprising about the fact that ordinary tap water can be so used. A single drop of water resting upon a coil many degrees below freezing would undoubtedly freeze within a short time because of its small heat content. But when a considerable quantity of water is sprayed over a coil, the amount of heat available is greatly multiplied and the water is continuously in motion and does not remain in contact with the coil for more than a moment or two. The water is then drained immediately to the outside of the refrigerated space. The water does not freeze because no given quantity of water is within the refrigerated space long enough for its temperature to be lowered below its freezing point (R. 272, 1031).

But McAdam does not have a patent for defrosting with water in a below freezing atmosphere. Claims broadly covering the *method* of thus defrosting were asked for and *cancelled* during the prosecution of the McAdam patent in the Patent Office (R. 1342-3, 1414) and therefore no contention can be made that such a method is covered by the patent.

As stated above, McAdam's patent is for an *apparatus*—a mechanical device which consists of a combination of old

* "Heat", "warm" and "hot" as used in this connection do not necessarily connote a high temperature. Any temperature above that of the coil would constitute the application of heat, and any temperature above the freezing point of water would be sufficient to melt the frost (R. 1008).

parts. Claim 13 is for a coil, a spray head, a fan, a drip pan with a self draining conduit, an inclined conduit to supply the spray water, valve means to let water in and to drain the water back out of the conduit; all of this in combination with a refrigerated space.

These elements were all old and it was old to use them for the very purposes for which they are used in this combination. As we shall see, a fan refrigeration unit with a water defrosting header and supply and drain conduits, was old in both the patented and practical arts (*infra*, pp. 16-52); and it was old to use a valve in a water supply conduit which opened and shut off the supply of water, and allowed the water ahead of the valve to drain back through the valve when it was closed (*infra*, p. 52). Such valves are called "three-way" valves (McAdam patent, R. 1431, col. 1, l. 9) or sometimes "stop and waste" valves. The use of such valves was common plumbing practice to drain all pipes in periodically unheated houses which might be exposed to below freezing temperatures (R. 431, 464; Plff's Ex. 102, R. 1296-7). And such valves were used in connection with water defrosting units (*infra*, pp. 29, 36, 41).

And finally it was old to use all of these parts in combination with a refrigerated space. After all, the whole purpose of the unit was to refrigerate a space, and the prior patents and prior uses show that such units were so used.

A. Refrigeration's Position as to the Alleged Invention.

Since York proved conclusively by prior patents and the depositions of twenty-five witnesses that water defrosting was old, and that the combination of the elements of the claims *as written* was anticipated, Refrigeration took the position that the "refrigerated space" mentioned in the claims should be interpreted by reference to the specification to mean a space "*maintained at all times below the freezing temperature of water*" (R. 278).

Its proofs in support of the patent and its arguments to distinguish the prior art were based upon this position. Its patent expert Doble stated on cross examination (R. 277-9):

“Q. Now, isn’t it a fact, Mr. Doble, that none of the claims excepting claim 10, 11 or 13 mention anything about temperatures?”

A. Temperatures,—in what respect?

Q. Well, as to whether the refrigerated space is above or below freezing.

A. Yes, they do. I will refer to claim 1. Claim 1 states,

‘In combination with a refrigerated space.’

“Now, to understand what that means, we turn to the first two paragraphs in the patent, appearing on page 1, starting at line 1, reading:

‘My invention relates to low temperature refrigeration where a space is required to be constantly maintained at temperatures below the freezing point of water,’—that is very, very definite—‘and the invention relates more particularly to methods and devices for defrosting the coils or heat transfer surfaces used in maintaining such conditions.’

“We have got to maintain that sub-freezing condition.

Q. Yes.

A. Now, wait a minute. I haven’t finished.

Q. Oh, I am sorry.

A. This is the second paragraph starting in at line 8:

‘Where the air which is being recirculated over these low temperature surfaces never rises above the freezing point of water periodic defrosting under maintained low temperature conditions has presented many problems.’

“And that was his problem, how to meet that condition and solve it, and that is what McAdam solved. Continuing the reading of that paragraph:

‘It is an object of this invention to provide simple [356] and highly effective means for so defrosting.’

“That definition clearly defines the temperature at which these combinations are to be used, and *defines clearly that the refrigerated space is to be maintained at all times below the freezing temperature of water.*

Q. So that you are interpreting the term ‘refrigerated space’ in the claim from the specifications?

A. You have to. You always interpret the elements in the claims from the specifications. You know that.

Q. You won’t say ‘Yes’ to that? A. I have no objection to saying ‘Yes,’ if you ask a question so that I can say ‘Yes.’

The Court: And so long as you can say ‘but.’

Q. By Mr. Neave: Now, Mr. Doble, apart from that phrase ‘in combination with a refrigerated space,’—apart from that phrase, taking claim 1, the rest of the claim are elements of an apparatus; isn’t that true?

A. Yes.

Q. That is the refrigerating apparatus?

A. Yes, *but that apparatus has to be used in combination with a refrigerated space.* Otherwise, there is no problem.”

B. York’s Position.

It is York’s position that

(a) if the alleged invention is, as Refrigeration contends, for the combination of the old parts with the old refrigerated space continuously maintained below freezing, then

1. The patent is invalid because such combinations existed in the prior practical art and the prior patented art; because even if this were not so, there is no invention in combining old elements to produce an old and expected result; and because a new use of an old device is not patentable;

2. the patent is not infringed by York, because there is no evidence that York made, used or sold a below freezing refrigerated space, an essential ele-

ment of the invention; in fact there is no proof that York made, used or sold *any* refrigerated space.

(b) Refrigeration can not successfully contend that the "refrigerated space" of the claims means "a refrigerated space always maintained below freezing".

1. Refrigeration is estopped from so claiming in view of the prosecution of the McAdam application in the Patent Office.

Refrigeration asked for claims in which the term "refrigerated space" was qualified by the phrase "the air of which is continuously maintained at a temperature below the freezing point of water". The Patent Office Examiner, in rejecting the originally numbered claims 1-14, stated (R. 1368):

"... Applicant has attempted by amendment to differentiate his claims over the prior art cited by stating that his device *continuously* maintains a freezing temperature below the freezing point of water. However, such limitation is immaterial in so far as patentability is concerned since practically all refrigeration systems continuously maintain a predetermined temperature which may be above 32° or below 32° depending upon the particular requirements placed upon the system. However, such regulation or particular degree of temperature maintained is not of patentable import." (Examiner's emphasis.)

Subsequently Refrigeration, in response to such holding, cancelled the limitation that the air of the refrigerated space "is continuously maintained at a temperature below the freezing point of water" from all the original claims where it occurred, stating that its action was "in accord with the Examiner's statement, *with which applicant agrees*, that any refrigerated space is apt to go below the freezing point of water" (R. 1372). A similar limitation was also cancelled from the first part of the later added present claims 10, 11, and 13 (R. 1413, 1414).

Having complied with the requirement of the Examiner to cancel the sub-freezing limitation, Refrigeration, as the owner of the McAdam patent, cannot now assert that the sub-freezing limitation is validly a part of any claim of the patent, by implication or otherwise.*

A limitation either added to, or subtracted from, the claims during the pendency of an application in the Patent Office may not be later ignored when construing the claims either to narrow the claims to avoid a prior art reference or to broaden the claims to cover an alleged infringing device. The Supreme Court stated in *Schriber Co. v. Cleveland Trust Co.*, 311 U. S. 211 at pages 220-1:

“It is a rule of patent construction consistently observed that a claim in a patent as allowed must be read and interpreted with reference to claims that have been cancelled or rejected, and the claims allowed cannot by construction be read to cover what was thus eliminated from the patent.”

And at page 221:

“True, the rule is most frequently invoked when the original and cancelled claim is broader than that allowed, but the rule and the reason for it are the same if the cancelled or rejected claim be narrower.”

* Nor can claims 10, 11 and 13 be distinguished over the prior art because they still contain uncanceled a clause specifying discontinuing the fan during the defrosting period “*whereby* the air of said refrigerated space does not rise above the freezing point of water during the time required for defrosting.” *Frank F. Taylor Co. v. Wise*, (D. C. S. D. Ohio, 1933) 5 F. Supp. 918, at page 924:

“The addition of a ‘whereby’ clause to a claim calling for an otherwise old structure does not render the claim patentably novel. *Electro-Dynamie Co. v. Westinghouse Electric & Mfg. Co.* (C. C.) 191 F. 506, 508.”

To the same effect:

Gynex Corporation v. Dilox Institute of Feminine Hygiene Inc., (2 Cir., 1936) 85 F. 2d. 103, 105.

To the same effect: *Morgan Envelope Company v. Albany Paper Company*, 152 U. S. 425, 429 (1894); *Gasair Corporation v. Ransome Company*, (9 Cir. 1944) 140 F. 2d 818, 819.

2. Refrigeration's contention is also untenable because in effect it turns apparatus claims into method claims. As already stated, method claims were abandoned during the prosecution of the McAdam application and can not now be recaptured.* It follows from Refrigeration's argument that when the parts of the combination are used with a refrigerated space one degree below freezing that combination is an infringement, but when the temperature of the space rises one degree above freezing, those very same mechanical parts no longer constitute an infringement. But an apparatus can not be a patented one at one instant, and the very same structure not patented the next moment. Therefore Refrigeration's contention must be that the alleged invention is not an apparatus, a combination of physical parts, but must reside, if at all, *in their manner of use*. However, McAdam was not granted any patent for a manner of use or a method (R. 260), and Refrigeration can not interpret the claims to recapture what was abandoned.

C. The Opinion and Findings of the District Judge

The two-paragraph opinion of the District Judge, handed down from the bench the day after the conclusion of testimony and without benefit of briefs after trial, indicates that the Court sustained claim 13 under a misapprehension as to the nature of the patent and its Patent Office history.

In stating that claim "13 is the only claim which has the entire combination for constantly maintaining temperatures in a room below the freezing point of water", and that "I have held claim 13 valid, because it is the only claim which describes all of the elements of the combination" (R. 12), the Judge fell into the error of reading into the claim a limitation of "constantly maintaining temperatures in a room below the freezing point of water". This was error

* *Supra*, page 9.

because such a limitation was specifically abandoned during the prosecution of the McAdam application (*supra*, pp. 9, 15; R. 1372, 1413, 1414) and therefore can not now be claimed. The Court also erred because it apparently thought the nature of the invention was a manner of use—a method, “constantly maintaining temperatures in a room below the freezing point of water”,—when such is not the fact as the claims are apparatus claims, and can not be interpreted as method claims, especially since method claims were abandoned during the prosecution and cannot now be recaptured (*supra*, pp. 9, 15; R. 1342-3, 1414).

The opinion does not discuss or even refer to any of the evidence of prior patents or of prior uses, or to any of York’s defenses.

The District Court held the patent infringed “because if you [York’s counsel] are correct in your contention concerning infringement, then no claim of the patent would be valid” (R. 12). Just what the Court meant by this statement is not clear. At all events, it is obvious that the District Judge did not understand York’s argument of non-infringement.

Findings were submitted by both parties, the Court signing those submitted by Refrigeration *without any change*, except changing the date from October 1946 to March 24, 1947 (R. 23). As we shall see, the Findings are not supported by the evidence.

II. The McAdam Patent Is Anticipated.

The parties have stipulated (R. 295) that the date of conception of the McAdam device is September, 1937. Any device meeting the claims of the McAdam patent and sold or used or described in a publication prior to that date anticipates the patent and thereby invalidates it.

York introduced into evidence the depositions of twenty-five witnesses whose testimony establishes six instances of the prior manufacture, use, sale and knowledge of water defrosting apparatus each of which anticipates

McAdam's device. In each instance the witnesses produced were those who had the best knowledge of the apparatus and its operation, and their testimony was supported by 73 documents. Refrigeration called no witnesses with respect to these uses except one witness who in fact confirmed the existence and use of one of the devices (R. 1073-90).

As we shall show, the findings of the Court below that the patent was not anticipated by these prior uses and sales are not supported by the evidence and should be disregarded.

*In this case there is not the usual presumption in favor of the findings of a lower court because here the testimony was in the form of depositions and the witnesses, with one exception, were not before the District Court.** This Court said in *Paraffine Companies v. McEverlast, Inc.*, (9 Cir. 1936) 84 F. 2d 335, at page 339:

“The evidence presented by the defendant on this issue was all in the form of depositions. Hence there is no presumption in favor of the trial court's findings thereon. *Rown v. Brake Testing Equipment Corp.* (C. C. A. 9) 38 F. (2) 220, 223.”

And more recently this Court said in *Western Union Telegraph Co. v. Bromberg*, (9 Cir., 1944) 143 F. 2d 288 at page 290:

“Mr. Bromberg's testimony was by deposition, hence, the appellate judges are in as good a position to weigh his evidence as was the trial judge.”

* Also, at the request of the District Court (R. 354-5), many of the depositions were not read, but were summarized and copied into the Record. (R. 432, 433, 435, 470, 538, 576-579, 591-592, 607, 635, 644-6, 698-699, 745.)

A. THE GAYLEY SYSTEMS.

The first uses of water to defrost in point of time were in connection with the Gayley dry blast systems which were in use at the Isabella Furnaces of the Carnegie Steel Co., Pittsburgh (Etna), Pa., from 1906-1921 (Plff's Ex. 2-A, R. 1118, R. 314); at the South Works of the Illinois Steel Co., South Chicago, Illinois, from 1907-1912 (R. 505-6); and at the Northwestern Iron Company, Mayville, Wisconsin, from 1909-1928 (R. 592-3). The purpose of Gayley's dry blast system was to cool and thereby dehumidify the air which was to be delivered to the blast furnaces of the above steel plants. To do this, in each case, the air was blown by means of a huge fan through a refrigerator building which was divided up into separate rooms or chambers, each chamber containing many thousands of feet of cooling coils which were cooled by pumping through them cold brine. The moisture which was withdrawn from the air as it passed through the chambers was deposited on the coils in the form of frost or ice and this was removed from the coils by means of water sprayed over the coils from headers positioned over them, the melted frost and water being drained from the pan-shaped bottoms of such chambers by means of floor drains (R. 314-6, 324, 506-11, 594).

Each of these installations was defrosted in much the same way. The air which was being blown through the building by means of the *fan* was cut off from the chamber which was to be defrosted by closing shutters in the basement and at the top of the chamber (R. 318, 508, 594). This is equivalent to shutting off the fan in McAdam's device. After the cold brine had been withdrawn from the coils*, the water was turned on and allowed to *spray* over the coils until all the ice and frost had been removed. The water was then shut off and a *drain valve* was opened which was so placed in the inclined water supply conduit that all

* Cooling is likewise discontinued in McAdam during defrosting by stopping the compressor (McAdam patent, p. 3: 1st col., lines 43-49; 2nd col., lines 37-68.)

the water left inside the refrigerated space would drain to the outside (R. 389, 510, 595). The cold brine was then pumped back into the coils and the chamber put back in operation by opening the shutters and allowing the air once more to be blown over the coils (R. 320, 510-1, 597).

All these Gayley installations were operated at sub-freezing temperatures substantially all the time (*infra*, pp. 25-28).

1. Pittsburgh

The drawing on the left of Plaintiff's Exhibit 1 (R. 1117) reproduced opposite page 18, shows an end elevation of the refrigerator building of the Dry Blast Plant at the Isabella Furnaces in Pittsburgh. At the extreme left of the drawing is the water supply for defrosting labeled *6" Water Main* with the inclined water supply conduit marked *6" Pipe* (colored yellow in this brief) leading upward into the compartment, where it feeds into a header, colored red, labeled *6" Water Header*. Extending from this header out over one of the chambers filled with brine coils is a pipe, also colored red, labeled *Water Spray 2" Pipe*. At the extreme left and at the bottom of the vertical pipe is a valve labeled *6" Gate Valve* which controlled the supply of water to the spray pipes. Just above the gate valve in the vertical pipe is another valve labeled *1" Drain Valve* (colored purple), which was opened to drain the pipes immediately after the supply of water was shut off, and left open until the next defrosting period, thus providing an opening in the supply conduit at a point remote from the refrigerated space which was normally open to the atmosphere. Upon opening the drain valve the weight of the water in the vertical supply pipe (colored yellow) would cause a siphon action which would drain all the water in the header and spray pipes (colored red) regardless of whether they were horizontal or pitched (see R. 1360-1). The drawing does not show a floor drain, but it is apparent from the fact that the floor is pitched that such a drain was provided.

Thus there are present all of the elements of McAdam's device and in precisely the same combination. The general operation has already been described. In the patent the fan is turned off; similarly in the Pittsburgh use the doors were closed at the bottom so that the air to be cooled would not pass between the coils of the chamber being defrosted into the refrigerated space. In the patent the refrigeration is stopped; in Pittsburgh, for the same purpose the brine was removed from the coils; in the patent and in this prior use a valve is turned admitting water through pipes so that it sprays over the coils until all frost is removed, when the water valve is closed and the drain valve opened, draining all water from the defrosting system. And in both devices the refrigeration is then restored and the air allowed to pass through the coils again, in the patent by starting the fan, in the Pittsburgh prior use by opening the doors at the top and bottom of the chamber (R. 318-320; 363-365; 386-390).

The witnesses who testified to this prior use were the following:

Frank C. Bauer (R. 298), Chief Engineer of the plant, who produced and identified plant drawings (Plff's Ex. 1, R. 1117) and contemporaneous letters about the operation of the defrosting mechanism (Plff's Ex. 2A-6B, R. 1118-24).

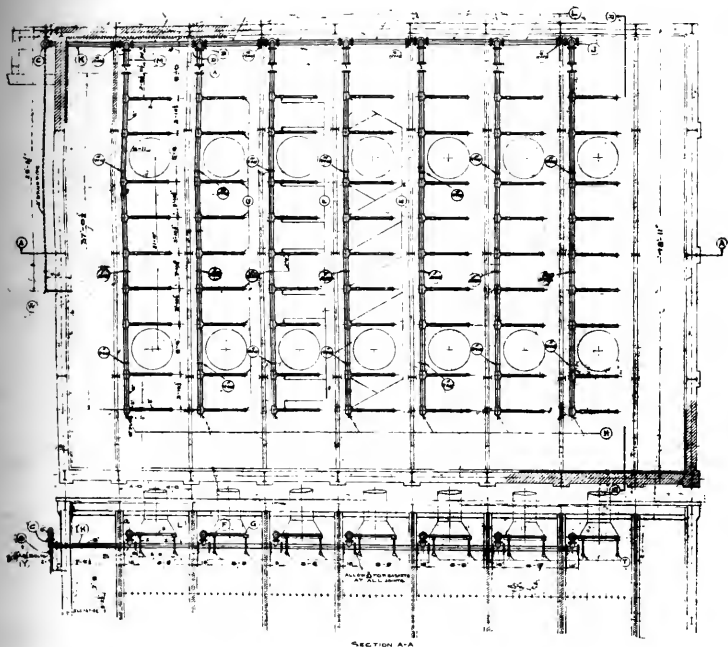
A. Raphael Kernan (R. 309), in charge of plant employment records, who testified as to dates of employment of the witnesses named below.

Jesse O. Brandt (R. 313), operator and engineer of the Dry Blast Plant, which included the defrosting system, from 1909 until 1921.

Edward G. Kennedy (R. 361), who ran the Dry Blast Plant from its inception until 1915.

Edward Harkins (R. 384), who was the defrosting operator or "coil tender" in 1915, described exactly what operations he went through in defrosting.

PLAN VIEW OF REFRIGERATOR BUILDING AT CHICAGO,



The testimony of these witnesses establishes clearly the structure and operation of this Dry Blast Plant in Pittsburgh for a period of fifteen years from 1906 to 1921. Considering the fact that this operation started over thirty years ago, their testimony is remarkably clear and definite. Their recollection was supported by blue prints of the plant contemporaneously made in 1906 (Plff's Ex. 1, R. 1117) and letters written in 1906 by Bob Taylor to the Chief Engineer, Bruce Walter (R. 301), describing the water defrosting (Plff's Exs. 2-6B, R. 1118-1124). As Taylor wrote in 1906, "Water is certainly fine for thawing for the pipes are just as clean now after thawing as the day they were put in" (Plff's Exs. 6-A, B; R. 1123).

Refrigeration produced no witnesses concerning this prior use.

2. Chicago

The construction of the defrosting pipes in the Refrigerator Building of the Dry Blast Plant of the Illinois Steel Company's South Works in Chicago, installed in 1907, is shown in Plff's Ex. 31 (R. 1153) the upper left portion of which is reproduced opposite page 20 of this brief. Shown in the reproduction is a 6" water supply main (colored yellow outside and red inside the Refrigerator Building) extending along one side wall above the level of the top of the brine coils. A 6" distributor line (colored red) extended into each of the seven chambers above the level of the supply main, with 3" branch lines extending laterally over the coils from each distributor line. Two 2" *spray heads* hung downward from each branch line as will be seen in the section at the bottom of the page. There was a valve marked (A) in each of the seven distributor lines so that water could be supplied to each compartment individually.

In the upper right hand part of Plff's Ex. 31 (R. 1153) which is reproduced opposite page 22 is an elevation view of portions of the Compressor Building, Brine Cooler Building and Refrigerator Building showing the 6" water

supply main (shown in yellow) as it came from the Compressor Building and entered the Refrigerator Building. Just before the supply main enters the Refrigerator Building there is shown a 2" *Drain Pipe* (colored purple) which was for the purpose of draining all the pipes inside the refrigerated space to the right immediately upon the shutting off of the supply of defrosting water (R. 510, 580). This corresponds to the element of the claims calling for an opening in the supply pipe at a point remote from the refrigerated space normally left open to the atmosphere (R. 511). Upon opening this drain, the weight of the water in the supply pipe would cause a siphon effect which would drain all the water from the pipes inside the Refrigerator Building regardless of whether they were pitched or horizontal.

This apparatus for water defrosting, which existed long before McAdam's alleged invention, thus includes all of the elements of McAdam's apparatus in the same functional relationship.

The operation of this defrosting system in Chicago was the same as that at Pittsburgh and therefore will not be described again. Its mode of operation as well as its structure was similar to the later disclosure in the McAdam patent.

The witnesses who testified as to this prior use were:

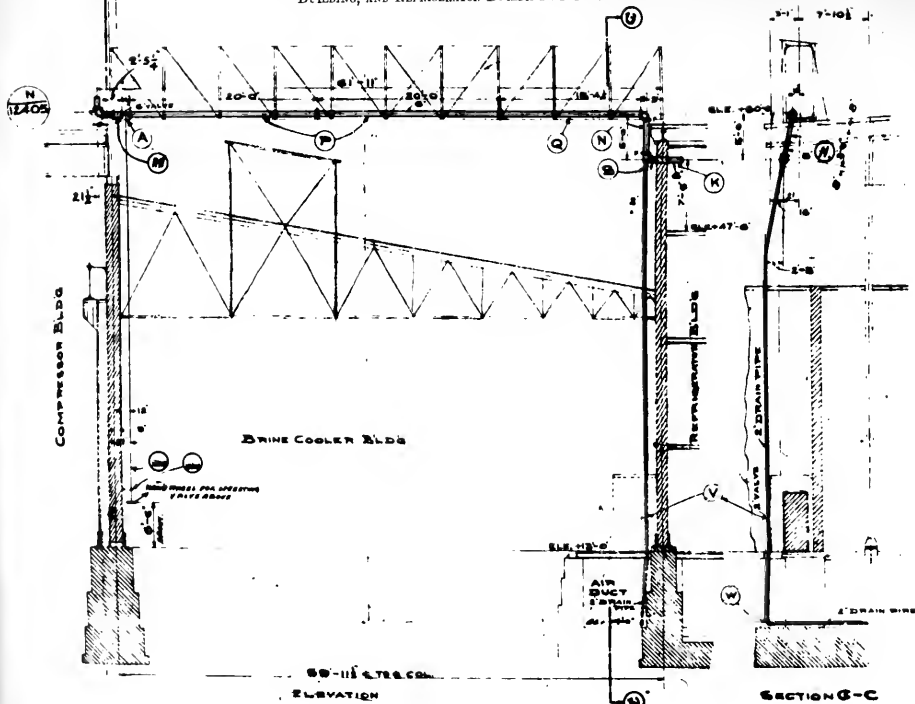
Herman L. Lietz (R. 568), assistant Chief Engineer of the South Works at Chicago, who produced and identified the photograph of the outside of the refrigeration building (Plff's Ex. 30, R. 1152), and the contemporaneous drawing of the piping (Plff's Ex. 31, R. 1153).

Nicholas L. Tominac (R. 505), who had charge of defrosting the Dry Blast Plant from 1907 until 1912.

Albert Gaide (R. 539), who erected the refrigeration machinery and was the engineer in charge of one shift of the operation of that plant from 1907 to 1911.

Plaintiff's Exhibit 31

ELEVATION VIEW OF COMPRESSOR BUILDING, BRINE COOLER
BUILDING, AND REFRIGERATOR BUILDING AT CHICAGO.



Alfred E. Mueller (R. 573), who was the engineer in charge of the other operating shift in 1908 and 1909.

The last three men had intimate knowledge of this Chicago plant's defrosting equipment, and its operation from 1907 until 1912. Their testimony was supplemented by construction drawings showing the defrosting system (Plff's Ex. 31, R. 1153) and 40 temperature charts (Plff's Ex. 32 and 33, R. 1154-1193) produced by Gaide and Mueller showing the temperature of the air after it had passed through the refrigeration chambers.

Refrigeration produced no witnesses concerning this prior use.

3. Mayville

The arrangement of water piping for defrosting as used at the Dry Blast Plant of the Northwestern Iron Co., in Mayville, Wisconsin, is shown on two drawings, Plff's Exs. 7 and 37 (R. 1125, 1205), the left hand portion of the latter being reproduced opposite page 24 of this brief. Before examining this drawing reference should be made to the figure to the left of Plff's Ex. 7, not reproduced in this brief but found at R. 1125, which shows the water supply conduit as it enters the building at the top right and extends over the brine coils where it is labeled "Water Pipe for Thawing." Extending downward from this supply conduit are several *spray heads*, or sprinklers. Also shown by this drawing is the fact that the floor of each compartment was pitched to a center floor drain.

The part of the drawing, Plff's Ex. 37 (R. p. 1205), reproduced opposite page 24 of this brief, is a plan view of the Refrigerator Building and the Pump House. The pertinent parts of this drawing were marked during the taking of his deposition by the witness Mueller, who left the Dry Blast Plant in Chicago in 1909 to go to work at the same type of plant in Mayville and was in charge of the operations at this plant during the entire period of its oper-

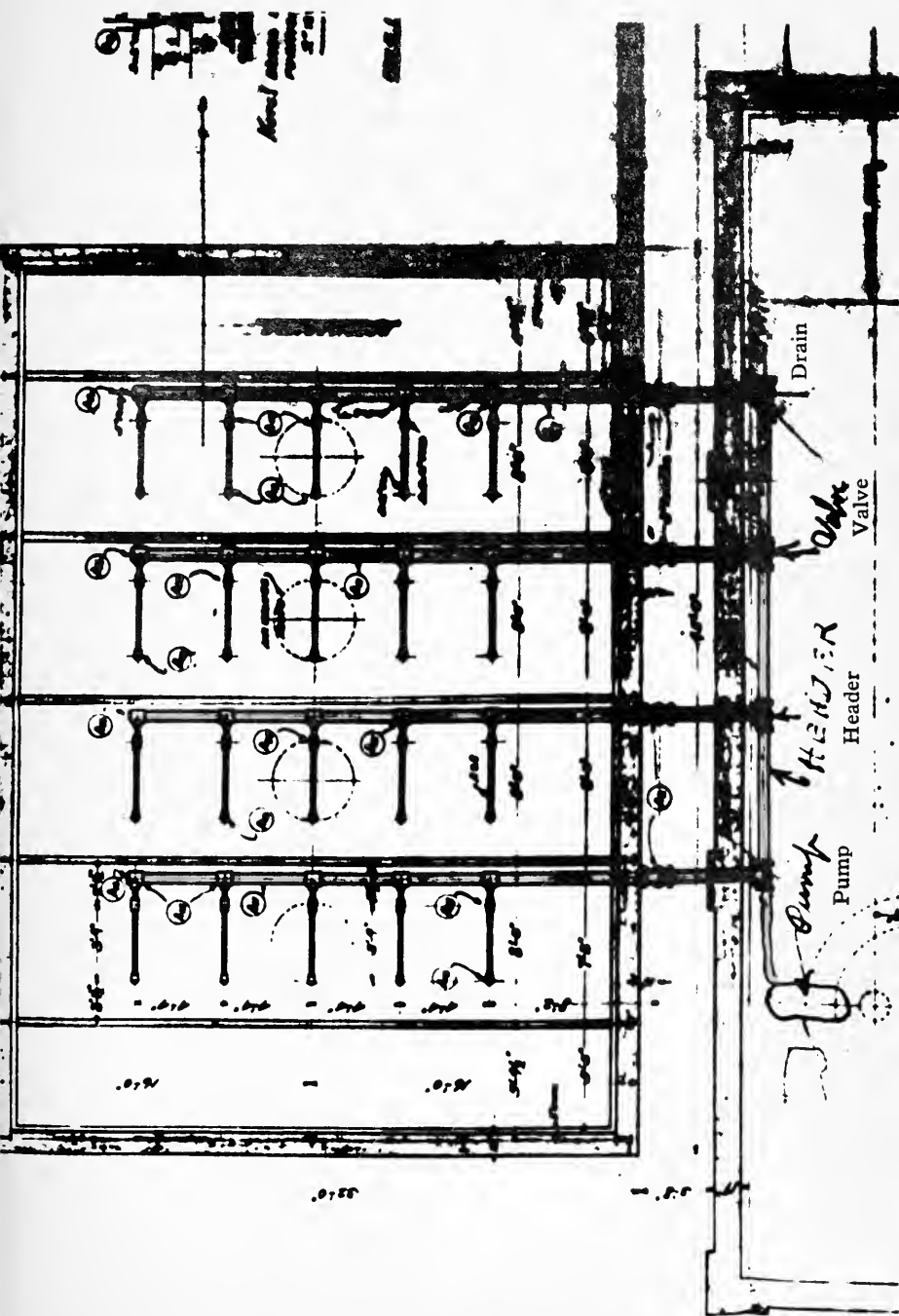
ation from 1909 until 1928 (R. 589, 593). The water for defrosting was drawn from a well by a centrifugal pump (R. 594), indicated on the plan of the Pump House, and supplied to a "Header" (colored yellow), which ran along the inside wall of the Pump House nearest the Refrigerator Building. Four supply conduits, one for each compartment of the Refrigerator Building, took off from this "Header," passed through the wall of the Pump Room and then travelled up the outside of and into the Refrigerator Building where they connected to the "*Water Pipe for Thawing*" mentioned above as being found in Plff's Ex. 7, and also shown in this reproduction of Exhibit 37 (colored red). In each of the supply conduits, where it took off from the "Header," was a "Valve" making it possible to supply water to one compartment at a time, and above each "Valve" was a "*Drain*" which was opened when the "Valve" was closed, thus allowing all water above the "Valve" and inside the Refrigerator Building to drain outside the refrigerated space (R. 600). This "Drain" was usually left open, except during the defrosting operation, so that in case the "Valve" leaked and water got into the supply conduit leading to a compartment which was not being defrosted, the water would drain instead of flowing into the compartment (R. 595). Thus there was an opening in the supply conduit normally open to the atmosphere.

The matter of drainage was also provided for in another way. Mueller, the man in charge, testified that the "Pump" was a centrifugal pump, and that when it was shut off, the weight of the water in the inclined supply conduit would cause the "Pump" to reverse itself and all the water in the supply conduit and inside the refrigerated space would flow back through the "Pump" and into the well (R. 595).

Refrigeration produced no witness to testify regarding this prior use.

REFRIGERATOR BUILDING AT MAYVILLE

(Plan View)



4. Gayley Systems Operated Below Freezing

TEMPERATURES EMPLOYED AT PITTSBURGH

Due to a flood which occurred at the Isabella plant at Pittsburgh (R. 342) no written temperature records are available with respect to the operation of that plant, but the witnesses, Brandt, Kennedy and Harkins, testified that the temperature inside the refrigerating chambers prior to defrosting was "below freezing all the time" (R. 319), "way under freezing" (R. 365), and "around 30, 28 or 30, sometimes far colder than that" (R. 391).

TEMPERATURES EMPLOYED AT CHICAGO

Temperature of the air at the top of the brine coils, just as it left the refrigerating chamber, was stated by Tominac as being "between 25 and 28 degrees Fahrenheit" (R. 514, 523). Mueller agreed that the temperature was below freezing, ranging from 20° to 34° F. (R. 581). This is substantiated by Plff's Ex. 32 (R. 1154-92) which is made up of 39 daily reports (produced by Gaide) of temperature readings taken hourly during the months of May, June, July and September 1910. The temperature of the air just after it had passed over the brine coils varied from 19° to 34° F. with the average well below freezing. Another report, in the handwriting of the witness, Mueller (R. 581), showed that the air as it left the coils averaged 25.34° F. and that the average outside air temperature during the same period was 67.666° F. (Plff's Ex. 33, R. 1193).

TEMPERATURES EMPLOYED AT MAYVILLE

Temperature reports of the Dry Blast Plant of the Northwestern Iron Company in Mayville, Wisconsin (Plff's Exs. 34, 35 and 36A to I, R. 1194-1204) some of which were made during June, July and August 1909 by Mueller, in charge of the dry blast plant at Mayville (R. 602-4), showed temperatures at the "Top of Coil" all below freezing (R. 604) and ranging from 20° to 31° F. During the same

period the outside air temperature as shown on these reports varied from 44° to 94° F. It is therefore entirely clear that the chambers were below freezing.

5. The Findings as to the Gayley Prior Uses.

Findings 21-27* relate to the Gayley prior uses. It is significant that not one of these casts any doubt upon the fact that water defrosting took place in each of the three prior uses. The findings are directed principally to two subjects: the position of the spray pipes, and the temperature of the coil chamber.

Finding 21 relates only to Pittsburgh and Chicago, not to Mayville, and states that it is not established that the systems were self-draining, but that, on the contrary, the supply and spray pipes were horizontally disposed. It does not follow that if the supply and spray pipes were horizontal they would not drain. As explained above (*supra*, pp. 20 and 22), the siphon effect caused by opening the drain valve in these systems would drain all the water out of the pipes, even though they were absolutely horizontal. The fact is, according to the uncontradicted testimony of five witnesses, that the systems, both at Pittsburgh and at Chicago, were self-draining (R. 335, 344, 373, 374, 389, 510, 580).

Findings 22-26 relate to the temperature of the coil chamber not being below freezing. This is contrary to the fact.

As already pointed out, the testimony as to the conditions at Pittsburgh indicates below freezing temperatures (R. 319, 365, 381) and the testimony and contemporaneous records prove this condition to have existed at Chicago (R. 514, 523, 581, 1154-93) and Mayville (R. 602-4, 1194-1204).

This operating condition existed during at least the first part of the defrosting cycle. Actually it is probable that during much of the defrosting cycle the chamber being defrosted remained below freezing because the relatively warm air from the outside was cut off, and the great mass of coils covered with ice would act as a refrigeration fly-wheel and have a large heat-absorbing capacity (R. 617-8).

* R. 17-18.

But whether or not the temperature of the chamber being defrosted rose above freezing during defrosting is in fact entirely immaterial. McAdam's "problem," if any, of introducing water into a below freezing zone for the purposes of defrosting was present in each of these three applications of the Gayley system at least at the beginning of the defrosting period. If the temperature rose above freezing later in the defrosting period, this is no more than would occur in McAdam's apparatus.

Also it is apparent that if a water pipe is to be subjected to a below freezing temperature at any time when the water is not running, it must be drained. The evidence referred to above establishes clearly that the chambers reached below freezing temperatures when in operation. The water supply pipes and spray heads in the Gayley systems were thus subjected to below freezing temperatures at least during the operating periods, and therefore the "problem" existed. It was solved by draining the pipes. The evidence is clear that the drainage means provided, namely valves and gravity, were the same as McAdam used, and were entirely successful because the systems never froze (Pittsburgh, R. 324, 369, 393; Chicago, R. 533, 585; Mayville, R. 604). There is no finding that such drain valves were not present.

Plff's Ex. 31, reproduced opposite page 20 of this brief, shows that the defrosting water main in the Chicago plant passed through the top of each of the seven separate chambers, six of which were being operated while the seventh was being defrosted. If, for example, the last chamber at the right of the drawing was being defrosted, the water would pass through the preceding six chambers which were at below freezing temperatures. Just as the water supply conduit passed into the below freezing refrigerated space in McAdam, so in this Chicago installation the supply conduit passed into and through the below freezing chambers that were in operation. And the water sprayed down on ice covered coils melted the ice, just as in McAdam. It was no "surprise" to the workers in the Chicago plant from 1908 to 1912 that ice could be melted with water, that running water could be taken through a below freezing

zone without freezing, or that the way to prevent water from freezing when it was not running was to remove it from exposure to freezing temperatures by draining it out.

Each chamber in the Gayley systems corresponds to the cabinet containing the coils in the McAdam patent. Any "problem" that existed in McAdam of spraying water over sub-freezing coils existed in the Gayley installations; any "problem" that existed in McAdam of bringing water through a freezing zone existed in Gayley as well; and any "problem" of water freezing when not in motion was present in the earlier installations as well. All these "problems" were solved in the three Gayley prior uses by using a sufficient volume of defrosting water and by draining the pipes when defrosting was complete.

These prior uses completely anticipate McAdam's patent.

B. THE POLAR ICE INSTALLATION

In the spring of 1934 Hayes Bros. Inc., of Indianapolis sold to the Polar Ice and Fuel Co. and installed at their retail ice station in Indianapolis, Ind., a blower type refrigerating unit similar to that described in the McAdam patent which was guaranteed to maintain a 30° F. temperature in the ice storage space (Plff's Exs. 13, 14, 15 and 16, R. 1127-33). On May 2, 1934 (Plff's Ex. 17, R. 1134) Polar wrote to Hayes Bros., complaining that the unit was unsatisfactory, because it did not maintain that temperature, and requesting that it be removed.

Shortly thereafter Joseph Hayes and Fred C. Barton, president and sales engineer respectively of Hayes Bros., inspected the installation and learned from Charles Martin, then operating the plant under lease from Polar, that he found it necessary to defrost the cooling coils by spraying them with a garden hose. Thereupon Hayes suggested that perforated pipes be installed over the coils in such a way that the coils could be periodically sprayed with water and that the necessary provisions be made for drainage (R. 407, 1143).

Mr. Hayes consulted Mr. Goldsmith, a patent attorney in Indianapolis, with regard to the patentability of the

apparatus and in a letter (Plff's Ex. 25, R. 1141) to his Washington partner, Mr. Galt, Mr. Goldsmith described the apparatus as disclosed to him by Mr. Hayes. The letter states in part (R. 1143):

“ . . . When the coils are sufficiently frosted and it is necessary to defrost, valve #1 [*refrigerant supply*] is closed, the fan is stopped and valve #2 (24) [*water supply*] is opened. This showers the coils and the supply pipe, headers, supply lines and nozzle discharge pipes are so proportioned that there is no restriction in the supply of water anywhere in the system. In other words, the full supply is completely and instantaneously discharged when valve #2 is opened and the *drain 26 is of such area it will carry off by gravity all the water supplied to the compartment 19*. This water passes thru the trap 27 and thence wastes at 28 . . . ”.

The actual installation at the Polar Ice plant, as testified to by Mr. Barton and Herbert Hayes, mechanical superintendent of Hayes Bros., who made the installation (R. 406, 439), consisted of three perforated pipes inserted in the blower unit immediately over the coils and connected to the city water supply by an inclined conduit. The supply of water to these perforated pipes was controlled by a three way or stop and waste valve (Plff's Ex. 22), having precisely the same function as the valve described in the McAdam patent. The drip pan below the coils was provided with a drain to a point outside the refrigerated space (R. 408, 440).

The appearance and mode of operation of the Polar Installation will be best understood by consulting the photographs opposite pages 30 and 32 of this brief (Plff's Exs. 19 and 21, R. 1136, 1138*). Exhibit 19 (R. 1136) shows the blower coil unit suspended from the ceiling in a corner of the ice storage room. The *fan* is behind the unit where

* These exhibits were marked with numbers and letters to indicate the various parts by the witness, Barton, and by counsel for Refrigeration during the taking of the depositions.

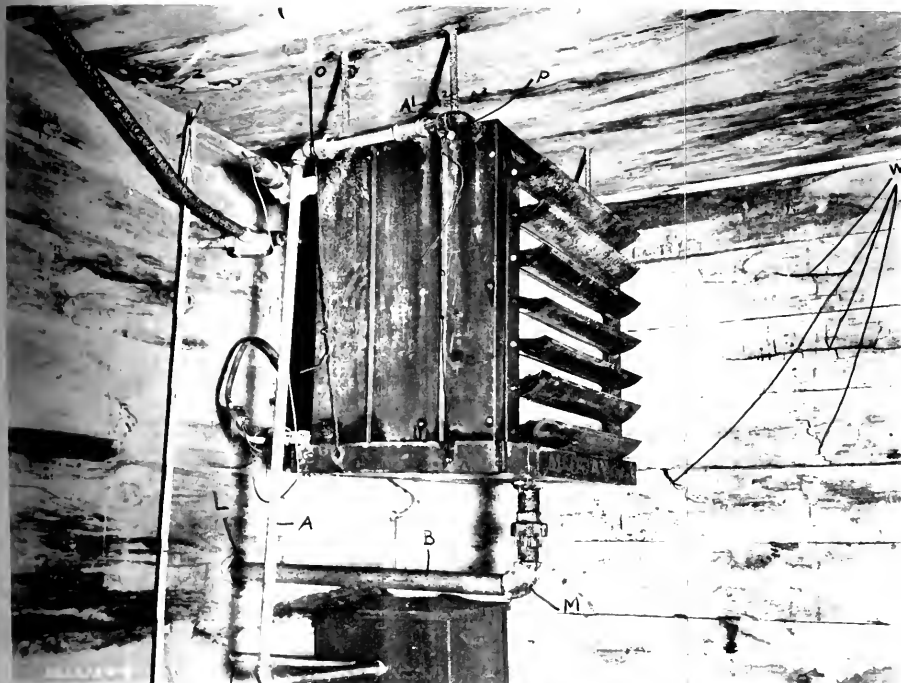
it cannot be seen. It should be noted that this is an enclosed compact blower type of refrigeration unit commonly sold prior to McAdam. The *water supply conduit*, A (R. 409), enters the refrigerated space at the point, R, and supplies water to the three *spray heads*, A¹, A², and A³ (R. 444), which extend into the unit immediately over the coils. The *drain pipe*, B (R. 409), extends downward from the drip pan below the coils and passes through the wall at the point, L.

The compressor and condenser of the Polar refrigerating system are shown in Plaintiff's Exhibit 21 opposite page 32 of this brief (R. 1138). These parts are located outside the refrigerated space. The wall shown in this picture is the other side of the wall shown in Exhibit 19 through which pass the drain pipe, B, and water supply conduit, A. The water supply conduit, A, having passed through the wall travels down to the pit in the foreground where it is connected to the city water supply (R. 411) through a *stop and waste valve* (R. 411-12). There is also another valve, 8, which controls the passage of water in the conduit, A. This is necessary so that water for cooling the compressor, C, and the condenser, D, may be supplied to them through the conduit, 2, without also supplying water at the same time for defrosting through the conduit, A. Water may also be supplied for defrosting without supplying the compressor and condenser with cooling water, by closing the valve, 3, in the line, 2, and opening the valves 1 and 8 (R. 413).

Also shown is the drain pipe, B, in which there is a trap to prevent the entry of warm air into the refrigerated space. The drain pipe wastes on the floor outside the refrigerated space (R. 411).

Referring now to both Exhibits 19 and 21, the procedure for defrosting described in the testimony is as follows (R. 445-6): (a) the fan and compressor are shut off as in the McAdam patent; (b) the valve 3 is closed and the valves 1 and 8 are opened, which supplies water through the conduit A to the spray heads A¹, A², and A³, this corresponding to opening McAdam's valve; (c) after the frost has been

Plaintiff's Exhibit 19
POLAR INSTALLATION
(Inside Refrigerated Space)



South West Corner of Tacoma & E. 10th St. Indpls. Ind.
5 July 31, 1944 Bass Photo Company

removed, the stop and drain valve 1 is closed to shut off the water, which, operating precisely the same as the valve described in the McAdam patent, at the same time allows all the water in the spray heads A^1 , A^2 , and A^3 and the conduit A, to drain out of the refrigerated space through the valve and into the pit through the spigot shown protruding from the side of the valve 1; (d) the valve 8 is closed and the valves 1 and 3 are opened, which supplies water to cool the compressor and condenser; (e) the fan and compressor are then started again. Of course, all water and melted frost which fell to the drain pan during the defrosting period immediately drained outside the refrigerated space through the drain pipe, B (R. 408, 440).

In its physical characteristics and method of operation this refrigerating unit sold by Hayes Bros., Inc. to Polar Ice in 1934, long prior to McAdam's invention, is practically identical with the apparatus described and claimed in the McAdam patent. Findings Nos. 28 and 32 (R. 18, 19) that the "Polar Ice Installation" does not anticipate the invention of the McAdam patent are in error.

The facts establishing the sale of this water defrosted refrigerating unit were testified to by the following witnesses:

Fred Barton (R. 402), sales engineer of Hayes Bros., who sold the unit to Polar and supervised its installation, identified numerous exhibits and (Plff's Exs. 13-21, R. 1127-38) described the water defrosting connections as installed and explained their operation (R. 405-414).

Herbert Hayes (R. 435), mechanical superintendent of Hayes Bros., who actually made the installation, described what he installed and how it operated.

Henry Dithmer (R. 466), Secretary-Treasurer of Polar, identified various documents (Plff's Exs. 13-17 and 23, R. 1127-34, 1139) as being from the files of the Polar Ice and Fuel Co.

Oscar Nester (R. 470), purchasing agent for Polar since 1923 (R. 471), identified the Hayes Bros. invoices establish-

ing the sale (Plff's Exs. 15 and 16, R. 1132-3) and testified that the installation was satisfactory and that the bill was paid (R. 471, 473).

Elmer Goldsmith (R. 477), a patent attorney, identified correspondence in 1934 describing the disclosure of a water defrosting device made to him by Joseph Hayes who suggested the Polar water defrosting apparatus (R. 407) (Plff's Exs. 24-28, R. 1140-1150).

Earl Simons (R. 488), lessee since 1936 of the Polar Ice station where the installation was made, stated that the piping, valves, etc. shown in the photographs, Exhibits 18-21 (R. 1135-8) are the same as they were when he took over in 1936 (R. 489).

Charles Stage (R. 497), office manager in charge of records at Hayes Bros. (R. 497), produced Plff's Ex. 27 (R. 1147) and Plff's Ex. 29 (R. 1151).

Charles Martin (R. 501), lessee of the Polar Ice station in 1934 at the time the installation was made, stated that the piping, valves, etc. installed in 1934 were the same as those shown in the photographs (Plff's Exs. 18-21, R. 1135-8).

1. Operated at Below Freezing Temperatures.

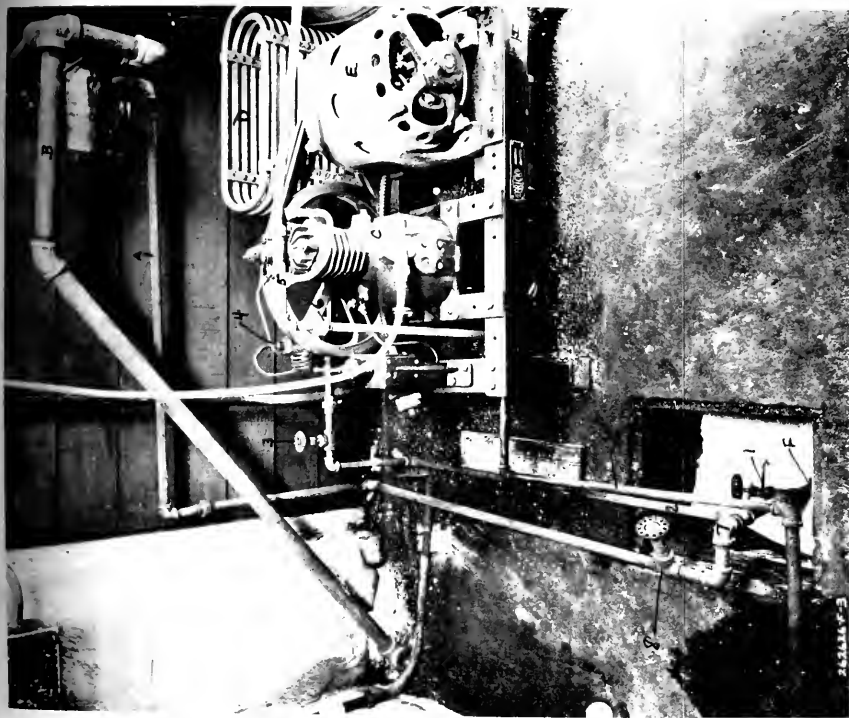
In regard to temperatures maintained by the Polar Ice device it will be recalled that the installation was guaranteed to maintain a 30° F. temperature and that the fact that this guarantee was not met when the unit was first installed was the occasion for the seller adding water defrosting to achieve the guaranteed temperatures. That the guarantee was met after water defrosting was put in, is evidenced not only by the fact that the job was adjudged satisfactory and was paid for (R. 471-473; 1139) but also by specific tests made before turning over the equipment to the purchaser. Mr. Barton, who supervised the installation, testified as follows (R. 413):

“75Q. Did you ever operate this system?
A. Yes, sir.

Plaintiff's Exhibit 21

POLAR INSTALLATION

(Outside Refrigerated Space)



South West Corner of Tacoma & E. 10th St. Indpls. Ind.
July 24, 1944 Bass Photo Company

76Q. When was that?

A. After the defrosting installation was made I operated this system to test and be certain same functioned satisfactorily and to illustrate to the plant operator and Mr. Lamar how same functioned.

77Q. Did it function satisfactorily to defrost the unit?

A. Yes.

78Q. Will you state whether or not the accumulated frost (527) on the unit was removed by the water spray?

A. The frost and ice was successfully removed from the coils with this spray.

79Q. How long did it take to defrost the unit?

A. Approximately ten minutes.

80Q. What temperatures were maintained by this unit in the ice storage room?

A. Approximately 30 degrees. The compressor was set to a cycle between 28 and 30 degrees.

81Q. How do you know that this temperature was maintained?

A. To satisfy the purchaser, I conducted a test, using six Bureau of Standards calibrated mercurial thermometers suspended in ice storage room, reading temperatures over a period of time.

82Q. What did these tests show?

A. These tests proved that the temperatures maintained by this installation were 30 degrees or less."

Herbert Hayes also testified (R. 446) that after completing the installation he made tests of the temperature inside the refrigerated space and found that he "was able to hold a temperature in the neighborhood of 28° in there".

There is nothing in the Record to contradict this testimony. Finding No. 30 (R. 18) that the Polar unit was not used, nor adapted for use, within a refrigerated space maintained below freezing is clearly in error as there is no evidence to support it. The fact that on the cross-examination of Mr. Simons, present lessee of the Polar Ice Plant, it was brought out that the plant is not *now* ordinarily operated at below freezing temperatures is of no consequence, for the defense here urged is the sale in 1934 of this appa-

tus. The Polar Ice installation was pleaded and proved by York not as a prior *use*, but as a prior *sale*. That the apparatus at the time the sale was made was designed and adapted, and actually did operate, to maintain temperatures below freezing is established by uncontradicted testimony.

2. Single Sale Enough to Anticipate a Patent

The law is clear that a single sale of an apparatus substantially similar to that claimed in the patent is enough to invalidate a patent. The Patent Statutes specify that an invention to be patentable may not have been in public use or *on sale* more than two (now one) years prior to the date of application for the patent. R. S. § 4886, 35 U. S. C. A. 31, *infra*, pp. 77-8. The Supreme Court stated in *Consolidated Fruit-Jar Co. v. Wright*, 94 U. S. 92 (1876) at page 94:

“* * * It follows that a single instance of sale or of use by the patentee may, under the circumstances, be fatal to the patent; and such is the construction of the clause as given by authoritative adjudications.”

It is not even necessary that an anticipating article be actually sold, but only that it be placed “on sale”. This Court stated in *Monogram Mfg. Co. v. F. & H. Mfg. Co.*, (9 Cir. 1944), 144 F. 2d 412 at page 414:

“* * * It is sufficient to establish anticipation of rotatability of the housing about such a clamp’s legs that in 1940 the rotatable Finkle clamp was in existence in plaintiff’s attorney’s office and was put to the business of demonstration for sale even though no orders at all were procured. *Automatic Weighing Machine Co. v. Pneumatic Scale Corporation, Ltd.*, 1 Cir., 166 F. 288, 292; *Deller’s Walker on Patents*, Vol. 1, pp. 377-381; Vol. 2, pp. 920, 930; *Christie v. Seybold*, 6 Cir., 55 F. 69, 76.”

Since it is not necessary that the anticipating article be sold but only placed on sale, it follows that the temperature at which it was actually *used* following the sale,

or that it was ever used, is quite immaterial. It is enough that the water defrosted refrigerating apparatus sold to Polar was capable of maintaining below freezing temperatures. That it was capable of doing so is established by the uncontradicted testimony of Barton and Hayes quoted above *supra*, p. 33.

3. Polar Installation Properly Drained

Refrigeration also obtained a finding No. 29 (R. 18) that the water supply conduit and the drain from the drip pan were not properly pitched for draining. This again was based on the testimony of Simons as to the *present* condition of this installation, not as to its condition at the time of installation, which is alone pertinent. Aside from the fact that Hayes, who installed the pipes, testified that they did drain as installed (R. 445-6) and that it seems inconceivable that rational men would have installed drain pipes which wouldn't drain, it was explained (R. 495) that in the present condition of the installation the ceiling to which is attached the blower coil unit has sagged somewhat over the course of years, which would account for any lack of a proper pitch to the pipes which might presently exist.

4. Not Abandoned or Discarded

Finding No. 31 (R. 19), that the Polar installation was abandoned and discarded, is obviously in error since it is still in use. The photographs, Plff's Exs. 18, 19, 20 and 21, (R. 1135-8) showing the apparatus in use were taken July 21 and 24, 1944.

Furthermore, whether or how it is *now* being used is entirely immaterial. As already pointed out, if the device had *never* been used, the mere fact that it had been on sale was sufficient to anticipate the patent. However, in this instance there was an actual sale of a unit which was designed to and did produce a 30° F. temperature with specified insulation (Plff's Ex. 13, R. 1128-9). Barton, who estimated the amount of refrigeration necessary at the

Polar plant, declined to express an opinion (R. 431) as to whether that temperature could be maintained today without knowing more about the extent of deterioration of the insulation, which was pointed out by Simons (R. 491, 496). If there is today any failure to maintain below freezing temperatures, which has not been proved, it could be due only to this deteriorated condition of the refrigerated space.

C. THE SWIFT & CO. INSTALLATIONS AT ELMIRA, N. Y.

Swift & Company opened on July 10, 1935, a branch in Elmira, New York (R. 1211-2) which included a pickle room and a sausage manufacturing room each of which was refrigerated by a fin coil blower type refrigerating unit which was defrosted by spraying ordinary tap water over the coils. These units, equipped with water defrosting, are still being used and have been in continuous commercial operation since that date (R. 662, 681), which was more than three years prior to McAdam's filing date of September 19, 1938.

Ordinary tap water is supplied to a perforated *spray* header through an *inclined conduit* which is shown to the right of Plff's Ex. 45 (R. 1214), which is a schematic drawing of both units. The water which is sprayed over the coils falls to a *drip pan* and thence through a *drain pipe* to the floor which is pitched to a center drain. In both units there is a *stop-and-waste valve* in the supply conduit just outside the unit casing and also an ordinary gate valve in the supply conduit at a point outside the room. The stop-and-waste valve in the pickle room is shown in Plff's Ex. 39 (R. 1207), and in the sausage room in Plff's Ex. 41 (R. 1209). In each case the knurled knob shown protruding from the side of the valve is the waste feature which operates to drain the supply conduit upon being opened.

In both cases when it is necessary to defrost, the compressor is shut down (R. 668, 684) and the water turned on and allowed to spray over the coils (R. 659). In the case of the pickle room the stop-and-waste valve immediately out-

side the unit and the knurled knob controlling the drain vent are always left open and the supply of water is controlled solely by the ordinary gate valve outside the room (R. 661, 682-3). In the case of the sausage manufacturing room the ordinary gate valve outside the room is always left open and the supply of water is controlled by the stop-and-waste valve just outside the unit (R. 659). In the latter case the knurled knob on the stop-and-drain valve is opened immediately following defrosting causing all water to drain from the perforated spray pipe and from the supply conduit on the discharge side of the valve (R. 660).

1. Temperatures Maintained

Neither of these rooms is continually maintained at a temperature below freezing, the sausage manufacturing room being usually maintained at a temperature of approximately 40°F. and the pickle room at a temperature of approximately 34-36°F. However, the temperature of these rooms occasionally goes below freezing, particularly over weekends when no one is entering or leaving the room (R. 668). It is significant that in the pickle room, which is maintained at the lower temperature, the supply of water for defrosting is controlled in such a way that the entire supply conduit and perforated spray header within the refrigerated pickle room are drained immediately following the defrosting period, whereas in the sausage manufacturing room, which is maintained at a higher temperature and therefore less subject to the danger of freezing temperatures, no provision is made for draining the entire supply conduit but only that portion of the conduit and the perforated spray pipe which is inside the refrigerating unit. In both cases the draining is done to prevent the possibility of the defrosting water freezing in the pipes (R. 662, 685).

Precisely the same "problem", if there be any, was met and solved here as was later met and solved by McAdam and in precisely the same way. Refrigeration contends that the "problem" was to introduce water into a space which was below the freezing point of water, defrost

the coils in that space (as it was commonly known water would do), and then remove the water from that below freezing space before enough heat had been removed from the water to cause it to freeze. In the case of the Swift installations the "problem" varied as between the two units. In the sausage manufacturing room, the higher temperature room, the only space which was expected to be below freezing was within the refrigerating unit and therefore provision was made to drain only those pipes which were within that space. In the case of the pickle room, the lower temperature room, the entire refrigerated space as well as the space inside the refrigerating unit was expected to go below freezing over the week end. Therefore provision was made to drain all portions of the pipes which were inside that refrigerated space. In both instances the "problem" was precisely the same as was faced by McAdam. In both instances it was solved in precisely the same way by the use of a stop and waste valve to drain all portions of the conduit and spray head which extended within whatever might be the below freezing zone.

The witnesses who testified in connection with this prior use were:

Louis V. Smith, now superintendent of the Swift plant in Elmira and associated with the company at that plant since 1933 (R. 655), described the structure and operation of the water defrosting units and identified the photographs and drawing of the units (Plff's Exs. 38-42 and 45, R. 1206-10, 1214) and the announcement of the opening of the Swift plant in July, 1935 (Plff's Exs. 43A-B, R. 1211-2).

W. C. Fuller has personally defrosted the two refrigerating units at the Swift plant ever since they were installed in 1935 (R. 681). He described the operation and identified the photographs of the units (Plff's Ex's 38-42, R. 1206-10).

Ralph Van Patten was the local plumber who installed the water defrosting connections in 1935 (R. 691-2). He had inspected the installation within a few days of testifying

and reported that there had been no changes made since they were installed (R. 693).

G. A. Personius, a local photographer, identified the photographs (Plff's Exs. 38-42, R. 1206-10) as being those which he had taken at the Swift plant on February 16, 1945 (R. 656-7).

Refrigeration obtained a Finding (No. 36, R. 19) that there is a third room at the Swift plant which was maintained at a temperature below freezing and in which an automatic water defrosting apparatus is not used. The refrigerating coils, however, in this third room were bare pipe coils which were arranged about the walls of the room. That type of installation requires only infrequent defrosting, usually not more than twice a year (R. 996). Since the coils are spread around the room, it is impractical to make use of a permanent type of spray head and the usual and easier practice of spraying them with a hose is followed.

Although the present condition of the water supply conduits is immaterial, Refrigeration also obtained a Finding (No. 35, R. 19) that the water supply conduits are now not inclined so that they will drain. However, their present inclination is explained by the fact that the hangers holding these pipes up have broken, allowing the pipes to sag (R. 686-7, 690). Moreover, the measurements upon which Finding No. 35 is based do not correctly show the inclination of the pipes. They were arrived at by taking the distance from the floor to each end of the pipe. Since the floor in each of these rooms is pitched to drain toward the center of the room (R. 694) a difference in the measurements would reflect only the inclination of the floor, but not of the pipe.

D. THE TRULLINGER AND EUSTICE INSTALLATION AT YAMHILL, OREGON.

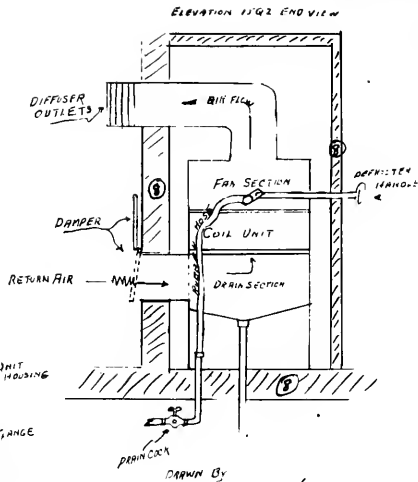
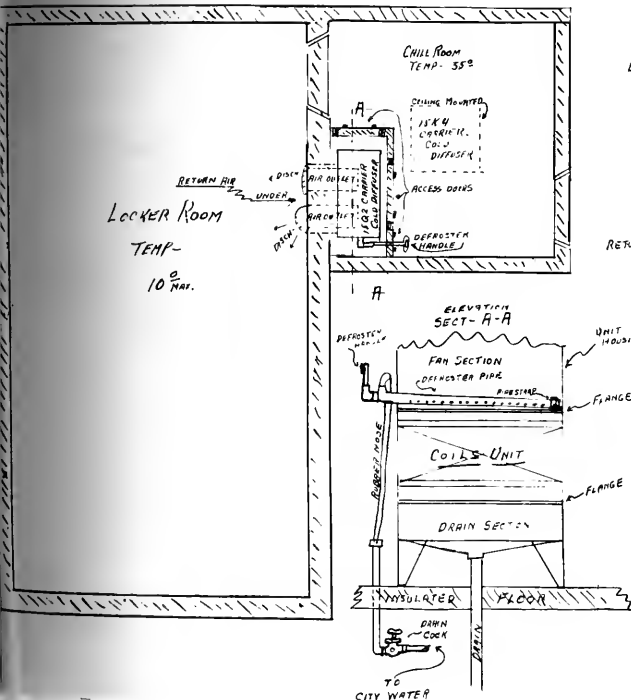
On September 26, 1936, W. C. Hulse, a salesman for Electrical Products Consolidated, submitted to Fred L. Trullinger, of Trullinger and Eustice, at Yamhill, Oregon, a proposal for the installation of refrigerating machinery

in his firm's locker plant at Yamhill. The plant consisted of a locker room which was to be maintained at an average temperature of 10° F. and a chill room adjacent thereto which was to be maintained at 35° F. The proposal provided that the refrigerating unit used to cool the locker room would be defrosted by "hot" gas defrosting (Plff's Ex. Y-1, R. 1215-18). This proposal was accepted by Mr. Trullinger and a contract incorporating the terms of the above proposal was entered into on September 28, 1936 (Plff's Ex. Y-3, R. 1220-25).

The installation of the refrigerating machinery was made early in November 1936 by Anton Broms, under the direction of Hulse and Postlewaite, the latter being in charge of the Portland office of Electrical Products Consolidated. These three men testified as to the installation and its operation as did also Trullinger and Eustice, the purchasers and users of the machinery. The installation was commercially operated from November, 1936 (R. 924) until December, 1938 or January, 1939 (R. 888).

The construction of this installation can be seen in the drawing reproduced opposite page 40 of this brief (Plff's Ex. Y-28, R. 1241; for photographs of portions of the equipment today see Plff's Exs. Y-14 to Y-18, R. 1231-5). The figure in the upper left-hand corner shows in plan view the locker room and the adjacent chill room, the only entrance to the locker room being through the chill room. A Carrier cold diffuser was mounted on the ceiling of the chill room to maintain the required 35° F. temperature in that room. A larger capacity Carrier refrigeration unit was installed on the floor of the chill room adjacent to the locker room wall, with air inlet and outlet openings through that wall to maintain the guaranteed temperature of 10° F. in the locker room.

As called for in the original proposal an attempt was made to use hot gas defrosting on the large capacity Carrier refrigeration unit. This type of refrigerating unit has only one compressor, one condenser and one evaporator coil. Hot gas defrosting is more feasible when there is



Clotulse

Plaintiff's Exhibit Y-28
250 8/20/1945 28

more than one evaporator coil to provide a stand-by supply of hot gas (R. 1024) and therefore, after two or three days, the attempt proved unsuccessful to defrost this type of unit with gas (R. 708). Broms, the installation man, then decided to use water to defrost the coils and, with the acquiescence of Postlewaite (R. 876), drilled a hole in one end of the refrigerating unit and inserted a perforated pipe over the coils (R. 709-10), as shown in Section A-A of the drawing opposite page 40 (Plff's Ex. Y-28, R. 1241). This perforated pipe was then connected by means of a rubber hose to the city water supply in the basement. A stop-and-drain valve was installed in the city water line in the basement (R. 711) which controlled the supply of water through the perforated pipe. When this valve was shut off and the drain feature opened, all the water in the rubber hose and in the spray pipe drained out of the refrigerated space (R. 714, 771, 780). Broms also connected a short piece of pipe to the spray pipe so that the latter could be oscillated while the water was running, thus spraying the entire surface of the coil (R. 710, 770, 876).

The operation of this system of water defrosting was as follows (R. 712-19; 815-16; 877-8; 934-5): the *fan* and the compressor were shut off; the *valve* in the water supply line was opened and the water allowed to *spray* over the coils, during which time the spray pipe was rocked back and forth by the operator; the top of the coil could be observed through a hole in the side of the unit and the bottom of the coil could be seen by looking through the return air opening from the locker room as shown in the drawing (Plff's Ex. Y-28); when it had been observed that all of the frost had been removed, which took approximately 5 to 15 minutes (R. 715, 935), the supply of water was shut off by closing the valve in the basement, at the same time the *drain valve* was opened, which allowed all the water on the discharge side of the valve to drain back through the valve; the fan and compressor were then turned on again.

This method of defrosting proved satisfactory, the required 10° F. temperature in the locker room being

achieved (R. 783, 839, 880, 939), and the locker plant was put into commercial use on November 11, 1936, at which time a turkey was tagged and placed in the locker room (R. 837). This turkey, which is shown in the photograph (Plff's Ex. Y-18, R. 1235), is still preserved, indicating that a temperature well below freezing has been maintained in the locker room since that time (R. 838).

As originally installed the large capacity Carrier refrigeration unit was openly exposed in the chill room (R. 707). Due to the excessively low temperatures maintained within the unit, heat was absorbed from the air of the chill room causing the temperature of the warmer chill room to go below the guaranteed 35° F. (R. 735, 781). To correct this condition an insulated wall, shown in the drawing (Plff's Ex. Y-28, R. 1241), was built in the chill room around this larger refrigeration unit (R. 781, 925), with removable panels in the wall making it possible to gain access to the unit for purposes of repair (R. 958). Also a handle was attached to the spray pipe and extended through a hole in the insulated wall (R. 782, 938) so that the spray pipe could still be oscillated from the chill room during the defrosting period.

The apparatus which was used at Yamhill meets in every particular the claims of the McAdam patent and there is no basis for the statement in Finding No. 37 that it is not established that those taking part in the installation had knowledge of the McAdam invention. This Finding states that "it is not established that said installation was either made, used or sold." As in the case of other Findings, there is nothing in the record to support this. The uncontroverted evidence is that the Yamhill water defrosting installation was made and sold by Electrical Products Consolidated to Trullinger and Eustice who then used it commercially for over two years. Refrigeration's own witness, Dahl, who was manager and chief engineer of Electrical Products, the concern that sold the unit, testified that in the early part of 1937 he saw this installation in use, equipped with water defrosting (R. 1086).

1. Operated at Below Freezing Temperatures

The testimony clearly establishes that the Yamhill unit produced below freezing temperatures and was in a space at below freezing temperature when it was defrosted. There can be no question but that the temperature of the locker room was well below freezing, the guaranteed temperature of 10° F. being maintained at all times (R. 783, 839, 880, 939). Refrigeration, however, contends and Findings 40 and 41 prepared by it state that the refrigerating coils were placed outside the refrigerated space and that the temperature of the space within which the coils operated was not maintained below freezing.

There is no limitation in claim 13 that the refrigerating unit must be placed *within* the refrigerated space. The claim does not read "*In a refrigerated space*" but rather "*In combination with a refrigerated space*" (R. 1432). Clearly the refrigerating unit at Yamhill was and is "*In combination with a refrigerated space.*"

However, the unit at Yamhill was not only "*In combination with a refrigerated space*" but was actually *within* a refrigerated space, and this space was at all times below freezing. It must be remembered that the heat absorbing capacity of the sheet metal casing of this refrigerating unit was so great that when openly exposed in the chill room as it was first installed, it brought the temperature of this room down below freezing (R. 735, 781, 929). When the unit was enclosed by an insulated wall in a small compartment this same heat absorbing capacity was concentrated on a much smaller volume of air. It follows that the temperature of the air within this space would be reduced even further below freezing. The witness, Hulse, in answer to questions by the Court, testified (R. 936-7):

"The Court: Then do you know the temperature of the room inside the insulated unit?

"The Witness: You mean the locker room or the little room?

“The Court: The little room where the freezer was.

“The Witness: That temperature was always at the locker room temperature or below.

“The Court: Was it there when you were defrosting?

“The Witness: It would still be always at that range.

“The Court: It would be at that or below?

“The Witness: That is right.”

Since the refrigerating unit was in the “little room” and one wall of this “little room” had on the other side the locker room, which was maintained at 10° F., and the other “little room” walls were exposed to the chill room temperature of only 35° F., the rise in temperature in the “little room” due to the passage of heat through the walls must have been negligible. The only other source of heat was the water spraying *inside the unit* during the short period of defrosting, and this could have had little effect upon raising the temperature in the little room. Therefore it is not surprising that the testimony established that water which splashed or leaked from the refrigerating unit during the defrosting period froze on the sides of the unit and on the floor of this insulated compartment and that this ice remained there continually, both during operating and defrosting periods (R. 880, 965-6).

The McAdam patent teaches that water should be sprayed over the coils from a spray header until the frost has been removed and provision should be made to drain the water away. This is precisely what was previously done at Yamhill. Assuming coils of the same size, an equal amount of frost, and water at the same temperature, the rise in the temperature inside the units during defrosting must be the same. Every advantage which can be asserted for McAdam’s apparatus can be made equally well for the Yamhill apparatus, because they are substantially identical in structure and operation.

Refrigeration obtained a Finding (No. 44) that the refrigerating unit was isolated from the locker room during

the defrosting period by placing the unit outside of the locker room and by closing doors over the air intake and outlet openings from the unit to the locker room. From this Refrigeration draws the inference that those concerned with the Yamhill installation did not conceive that water defrosting could be used at below freezing temperatures. However the testimony clearly shows that the refrigerating unit was placed outside the locker room in order to provide more locker space inside the locker room (R. 896), and that temperature of the air within the insulated wall was just as cold or colder than within the locker room (R. 880, 936-7, 965-6).

2. Not an Abandoned Experiment

It was established that the refrigerating unit equipped with water defrosting was in continual commercial use at Yamhill for over two years, or from November, 1936, to December 1938 or January 1939. There is absolutely no evidence to the contrary. The date of first use is established by the testimony of the men who installed the unit (R. 870, 924) and also by the testimony of Eustice, one of the owners of the locker plant, who told of the turkey which was dated and placed in the locker room on November 11, 1936, when the plant was opened to customers (R. 837). Eustice's ledger book (Plff's Ex. Y-20, R. 1237) also shows entries of payments by customers for locker space during the latter part of 1936. He stated that it was customary to pay for a locker at the time it was put in use (R. 843), and that the water defrosting apparatus was in use at the time of these entries (R. 844).

The water defrosting apparatus was removed and a warm air system of defrosting installed in the winter of 1938-39 by Western Engineering Co. (R. 888). The change-over could not have occurred earlier since that concern was not in existence until December 1938 (R. 870). Thus the dates of first use and of the change-over to warm air

are clearly established and Finding No. 46 (R. 21) that the dates were not established is in error.

There was a public, commercial use of this water defrosting apparatus for over two years in the regular course of the business of Trullinger & Eustice. Finding 38 (R. 20) that this installation was "an abandoned experiment" has no evidence to support it. There is no question but that the use at Yamhill was open and public. Hulse testified that occasionally he took customers of his out to show them the water defrosting apparatus and how it operated (R. 937). Such a public use for profit is not an experimental use. This Court stated in *Paraffine Companies v. McEverlast, Inc.*, (9 Cir., 1936) 84 F. 2d 335 at page 340:

"If the purpose of the prior use is chiefly experimental, such use will not defeat the subsequent patent, even though the use is long continued and viewed by the public. But, if the device is used in the regular course of production or commerce, and is not concealed from the public, it will invalidate the subsequent patent. *Smith & Griggs Mfg. Co. v. Sprague*, 123 U. S. 249, 8 S. Ct. 122, 31 L. Ed. 141; *Root v. Third Ave. R. Co.* 146 U. S. 210, 13 S. Ct. 100, 36 L. Ed. 946."

Finding No. 39 (R. 20) is misleading in stating that "several different methods of defrosting were attempted unsuccessfully and later abandoned." The testimony is that "hot gas" was used for a very short time, only two or three days (R. 708), and that the installation was completed on November 11, 1936 equipped with water defrosting (R. 848, 926). Water was thereafter used for defrosting the unit in regular commercial operation for over two years, when the changeover was made to warm air defrosting which is still being used.

Finding No. 39 also states that the warm air system of defrosting now being used "results in a rise in temperature

of the refrigerated space". There is absolutely no testimony or evidence of any kind to support this finding. Moreover, Mr. Chamberlain, assistant chief engineer of York, testified (R. 1009) that the use of warm air to defrost would not result in a rise in temperature in the refrigerated space. Jarvis, Refrigeration's general manager, admitted that with warm air defrosting the air circulates within the unit and does not go into the refrigerated space (R. 86).

Finding No. 42 states that "the attempt to use water for the purpose of defrosting was unsatisfactory" in spite of the fact that every witness who was directly connected with the installation, and particularly Trullinger and Eustice, who were the individuals most directly concerned, testified that the water defrosting was satisfactory.

Mr. Trullinger stated (R. 784) quite flatly that the water defrost system operated satisfactorily and explained what he meant by satisfactory:

"Mr. White: Q. 241. Did the water defrost system as you personally operated it satisfactorily to you defrost the coil?

* * * * *

A. *It was satisfactory.*

Mr. White: Q. 242. Did it defrost the coil?

A. It did.

Q. 243. Did you observe the coil afterwards?

A. Yes, I did.

Q. 244. Compare the appearance of the coil before and after you operated it.

A. Before it was all closed up with ice and frost, and afterwards it was clean of frost and ice.

Q. 245. What happened to whatever was removed from the coil?

A. Oh, it melted off and went down through the drain pipe."

Mr. Eustice stated that the water defrosting was satisfactory (R. 852):

“Q. 167. Was the system then satisfactory from the standpoint of maintaining the desired locker room temperature?

* * * * *

A. Yes, it was satisfactory as far as defrosting was concerned.”

Refrigeration's witness, Dahl, was the only witness who testified to the contrary but he admitted on cross-examination that he had never seen the installation defrosted (R. 1086-7) and that his information came from oral reports (R. 1087). His statement was rank hearsay. It was also brought out in the testimony of Mr. H. Calvin White, of counsel for York, that in April, 1945, Mr. Dahl had stated to him that the Yamhill water defrosting apparatus had operated satisfactorily (R. 1106) which directly impeached Dahl's testimony (R. 1089).

Finding No. 43 stated that it was established that the refrigeration machinery “was not paid for by the owners thereof, Eustice and Trullinger, during the attempt to utilize water for the purpose of defrosting”. There is no evidence in the record to support this, and the only evidence is to the contrary. Refrigeration's counsel attempted on more than one occasion to gain an admission from both Trullinger and Eustice that the installation at Yamhill had not been fully paid for until after the changeover to warm air defrosting and that the reason for withholding payment had been that the water defrosting had not operated satisfactorily. Both Trullinger and Eustice, however, insisted that the unit was satisfactory (R. 784, 852), that it had been paid for (R. 802, 848), and Eustice definitely stated that the refrigerating system had been fully paid for *prior to* the changeover to warm air defrosting. At page 848 of the Record, Eustice stated:

“By Mr. Lyon:

Q. 144. It is also true, Mr. Eustice, that you told me yesterday that you never paid for this system

because it was unsatisfactory; isn't that correct? You told me and Mr. Hy Jarvis down here that?

A. I said we didn't pay for the system until we thought it was in workable order.

Q. 145. That is, you didn't pay for it until after it was changed over to the hot air system?

A. No. No, I didn't say that.

Q. 146. Isn't that true?

A. No, it was paid before."

Even Refrigeration's own witness, Dahl, when asked by the Court whether his company got paid in full for the job, stated (R. 1085) "I cannot say definitely, but I would presume that possibly they did".

Various reasons were given for replacing the water defrosting with warm air defrosting. Trullinger stated that the warm air was less trouble to operate (R. 795). Eustice objected to the film of water left on the coil after defrosting with water (R. 851). These are objections which apply to the use of any water defrosting apparatus. Postlewaite stated that the water pressure at the locker plant was not at all times sufficient to effectuate a complete job of defrosting (R. 881). This was obviously a local condition which made any water defrosting unwise. At all events replacement of the water defrosting apparatus does not affect its validity as an anticipation. As stated in *International Carbonic Eng. Co. v. Natural Carb. Prod.* (D. C. S. D. Cal., 1944) 57 F. Supp. 248; affirmed 158 F. 2d 285, at page 265:

"... the discontinuance of the use of a machine does not mean that that machine did not exist as testified, nor that that machine did not perform its functions successfully so as to prove a prior use under the patent statutes."

The Yamhill installation was a complete anticipation of the McAdam patent.

E. THE PRIOR ART PATENTS

None of the prior art patents, hereafter referred to, was cited by the Patent Office during the prosecution of the McAdam application. Four relate directly to water defrosting; the other two cover various forms of stop and waste valves similar to that used by McAdam to drain his water supply conduit.

Water defrosting patents:

Brassert, U. S. No. 958,471 (R. 1257);

Gayley, U. S. No. 1,002,576 (R. 1261).

Of the four patents which are concerned with water defrosting, two cover improvements on "the well known Gayley dry blast system" (R. 1259, column 1, lines 13-14), which system we have considered in connection with the prior uses at Pittsburgh, Chicago and Mayville.

The patent to *Brassert* granted May 17, 1910, shows the defrosting water sprays 5 above the coils. The patent states (R. 1259, col. 1, lines 52-55):

"Preferably, warm water from the ammonia condensers is supplied, though *any supply of water at a temperature above freezing can be used.*"

Since the patent is directed particularly to means for utilizing the defrosting water to cool the condensing coils, it does not disclose the details of the water defrosting apparatus, this being considered common knowledge.

The *Gayley* patent granted on September 5, 1911, disclosed the use of baffles on the sides of the cooling compartment so that the air and water which passed through these compartments would be kept in close contact with the cooling coils.

Figure 6 of the patent (R. 1264) shows spray headers positioned over the coils and the specifications and claims refer to the use of water to defrost (R. 1265, lines 26, 36, 48, 74, 84; 1266, claim 4). This patent, being directed to a par-

ticular improvement, does not disclose the details of water defrosting and leaves the matter of drainage to the skill of the engineer installing the system.

Jensen and Roser, Fr. No. 800,640 (R. 1279).

The Jensen and Roser patent, which was published on July 15, 1936, covers a refrigerating system in which the cooling element consists of a cylindrical container through which extend lengthwise a plurality of hollow tubular air passages. The diagrammatic drawings (R. 1286) show that the air enters at the top of a surrounding cylinder 15, passes down between the inside of cylinder 15 and the outside of cooling container 2, and thence up through the tubes. The air is drawn through these tubes by a *fan* 9 which is not set in operation until the temperature of the air which is being cooled goes down to -2°C . (R. 1282). This indicates that the operating temperature is therefore something below that figure and of course below freezing.

Defrosting is accomplished by causing either a "*stream of air or water*" (R. 1282) to flow over the cooling container 2 from a perforated *spray* pipe 16 placed over the container. The melted frost and water are collected in a *drip pan* 14 and conducted outside the refrigerated space by the *drain pipe* 18. A control is provided whereby the fan is stopped during the defrosting period.

The Jensen refrigerating unit is placed within the space it is intended to refrigerate. The patent refers to the fan blowing the cooled air "against the ceiling of the cooling chamber" and that the "blower keeps the air of the chamber in continuous circulation, which is of advantage in the preservation of foodstuffs" (R. 1282). Since the thermostat is set to operate the refrigerating unit when the temperature gets up to -2°C ., which is between 28° and 29°F ., the refrigerated space is continually kept below freezing. This patent shows all of the parts called for in McAdam's claim 13 except a valve, such as the common three-way valve. It is obvious some such valve would have to be used, and this was left to the man skilled in the art.

Wenzl, U. S. No. 2,097,851 (R. 1271).

The *Wenzl* patent, granted November 2, 1937, discloses a device designed to cool the air in a given space *to a temperature below 0°* (R. 1275, col. 1, line 24). The aim of the invention is to minimize frosting and reduce air resistance. Therefore the cooling *coils* are flat cells through which the refrigerant travels in a zig-zag path. The air is drawn up over the coils at a high velocity and discharged into the refrigerated space by a *fan* positioned above the coils.

Referring to Figures 1 and 2 of the patent drawings (R. 1276, col. 2, lines 12-15) :

“A spray pipe 15, with perforations 16, is placed across the lower portion of the fan chamber 33 for defrosting the elements 1 *by water issuing from the perforations 16.*”

This patent, like the preceding one to *Jensen*, is another instance of a use of water to defrost cooling coils at below freezing temperatures.

Three-way or Stop and Waste Valve Patents:

Newman, U. S. No. 389,098 (R. 1243) ;

Heltzle, U. S. No. 389,652 (R. 1291).

Since it is admitted that “three-way” or “stop and waste” valves are old (R. 259) there is no necessity of discussing the above patents which show various forms of such valves, which were used “to provide means for controlling the water supply” and “to drain said supply pipe of water to prevent freezing in cold weather” (*Heltzle*, R. 1293, ll. 13, 17). *McAdam* used the same type of valve for the same purpose.

Refrigeration introduced no testimony in regard to the prior art patents discussed above. Its patent expert did not allude to or attempt to distinguish them in any way. Since there is no conflicting evidence on the question of whether

these prior art patents invalidate McAdam's patent, this Court is in just as good a position as was the District Court to decide this question.

F. THE PRIOR ART DEVICES ANTICIPATE THE McADAM PATENT REGARDLESS OF THE TEMPERATURE AT WHICH THEY WERE USED

All of the prior art water defrosting devices which we have examined, except the two units at Elmira, were designed to be used and were used at below freezing temperatures, and the pickle unit at Elmira was occasionally so used. York urges, however, that the question of temperature is immaterial and that each of these prior devices is a complete anticipation of the McAdam patent whether or not it was ever used below freezing.

The prior use devices had precisely the same structural elements as claimed in the McAdam patent. In each there was an inclined conduit which supplied water to a spray head positioned over the cooling coils, which conduit was equipped with a valve or valves to admit water and to allow the water to be drained by gravity as soon as the supply of water was shut off. In each case there was a drip pan or its equivalent which was drained by gravity to a point outside the refrigerated space. And each had a fan and coils.

The structure of the prior units made them entirely capable of being used in a refrigerated space continually below freezing, as indeed they were. McAdam made no structural changes which would cause his device to be any more capable of being used below freezing than those which existed prior to his alleged invention.

Assuming, contrary to the fact, that none of these prior devices was ever so used, the most that can be said for McAdam is that he was the first to use such a device in a refrigerated space continually below freezing. But a new use of an old apparatus is not patentable. As this Court stated in *Kruger v. Whitehead* (9 Cir., 1946) 153 F. 2d 238, 239, the use of a prior art device "for a new purpose does not amount

to invention". To the same effect is *Pevely Dairy Co. v. Borden Printing Co.*, (9 Cir., 1941) 123 F. 2d 17, 19.

In *Mathews Conveyer Company v. Palmer-Bee Company*, (6 Cir., 1943) 135 F. 2d 73, the Court said at page 89:

"An old mechanism fully capable of a use not then observed, anticipates a later patent for the application of that means to the new use. * * * Discovery of new uses for, or newly observed functions of a device, well known in the mechanical or structural arts, is not patentable invention."

Perhaps the most recent statement of this rule of law is to be found in *Old Town Ribbon & Carbon Co. v. Columbia R. & C. Mfg. Co.*, (2 Cir., 1947) 159 F. 2d 379 at page 382:

". . . Nevertheless, since 1793, unless a patent disclosed a 'new and useful art', a new 'machine', a new 'manufacture', or a new 'composition of matter', it has not been a valid patent. If it be merely for a new employment of some 'machine, manufacture or composition of matter' already known, it makes not the slightest difference how beneficial to the public the new function may be, how long a search it may end, how many may have shared that search, or how high a reach of imaginative ingenuity the solution may have demanded. All the mental factors which determine invention may have been present to the highest degree, but it will not be patentable because it will not be within the terms of the statute. This is the doctrine that a 'new use' can never be patentable. In this circuit we have many times applied it, and it has been recognized elsewhere."

McAdam's patent is for an apparatus. In order to be patentable an apparatus must be new in the sense that it must embody some *physical* improvement over that which existed before, and this improvement must evidence more ingenuity in its conception than that possessed by the ordinary skilled mechanic. This necessity for novelty in the *mechanical means* is expressed in *Grand Rapids Show Case*

Co. v. Weber Show Case & Fixture Co., et al., (9 Cir., 1930) 38 F. 2d 730. This Court said at page 731:

“ . . . ‘it is not the result, effect, or purpose to be accomplished which constitutes an invention, but the mechanical means or instrumentalities by which the object sought is to be attained. Patents cover the means employed to effect results’. *Kohler v. Cline Electric Mfg. Co.* (D. C.) 28 F. (2d) 405, 406.”

In the attempt to avoid the prior uses proved in this case, Refrigeration has been driven to the following untenable position with respect to invention: the McAdam patent covers an apparatus when the temperature of the refrigerated space is one degree below freezing, but it does not cover the same identical apparatus when the temperature rises to one degree above freezing. But surely a specific apparatus cannot be an infringement of an *apparatus claim* when the space is below freezing and a moment later *the very same structure* suddenly cease to be an infringement when the temperature rises above freezing. Refrigeration's dilemma arises from its attempt to import into its *apparatus* claims a use or method limitation, thinking that by so doing it can avoid these prior uses. However, the claims are for an apparatus, as their patent expert Doble admitted (R. 260) and not for a method of use. The distinction between process and apparatus claims is clear, as explained in *Nestle-Le Mur Co. v. Eugene, Limited* (6 Cir., 1932) 55 F. 2d 854. The Court said at page 857:

“ . . . The subjects covered by patents for a process and for a machine, although frequently related and in a sense often founded upon the same mental concept, are nevertheless in substance independent and radically different. As clearly stated in the authorities here cited, ‘a machine is a thing’, while ‘a process is an act, or a mode of acting’; ‘a new process is usually the result of a discovery; a machine, of invention’. In *Cochrane v. Deener*, 94 U. S. 780, 788, 24 L. Ed. 139, it was distinctly pointed out that a process may be altogether new, and produce an entirely new result, while the machinery ‘suit-

able to perform the process may or may not be new or patentable.' ”

Even assuming that McAdam was the first to think of the method of using water to defrost cooling coils in a below freezing atmosphere, the means which he adopted to effectuate his purpose were old. The machinery is old and therefore the patent granted to cover this machinery is invalid.

III. McAdam Patent Is Invalid For Lack of Invention

In order to be patentable the subject-matter of a patent must be not only “new” but it must also amount to an “invention.” *Thompson v. Boisselier*, 114 U. S. 1, 11.

The advance or improvement over the prior art must involve more skill and ingenuity than would be possessed by the ordinary mechanic skilled in the trade.

In *R. G. Le Tourneau v. Gar Wood Industries*, (9 Cir., 1945) 151 F. 2d 432, this Court stated at pages 434-5:

“As the Supreme Court explained in *Cuno Engineering Corporation v. Automatic Devices Corporation*, 1941, 314 U. S. 84, 90, 62 S. Ct. 37, 40, 86 L. Ed. 58: ‘We may concede that the functions performed by Mead’s combination were new and useful. But that does not necessarily make the device patentable. Under the statute, 35 U. S. C. § 31, 35 U. S. C. A. § 31, R. S. § 4886, the device must not only be “new and useful”, it must also be an “invention” or “discovery”. * * * Since *Hotchkiss v. Greenwood*, 11 How. 248, 267, 13 L. Ed. 683, decided in 1851, it has been recognized that if an improvement is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art.’ The Court stated further, 314 U. S. at page 91, 62 S. Ct. at page 41, 86 L. Ed. 58, ‘A new application of an old device may not be patented if the “result claimed as new is the same in character as the original result” * * * even though the new result had not before been contemplated.’ ”

The application of this rule has tended to become increasingly strict with the passage of time. This tendency has been noticed and commented upon in *Picard v. United Aircraft Corporation* (2 Cir., 1942), 128 F. 2d 632 at page 636:

“We cannot, moreover, ignore the fact that the Supreme Court, whose word is final, has for a decade or more shown an increasing disposition to raise the standard of originality necessary for a patent. In this we recognize ‘a pronounced new doctrinal trend’ which it is our ‘duty, cautiously to be sure, to follow not to resist’. *Perkins v. Endicott Johnson Corp.*, 2 Cir., 128 F. 2d 208.”

It is apparent that McAdam's device does not measure up to these exacting standards. Since McAdam's patent is for an apparatus, his advance must be found in some mechanical improvement made in the physical apparatus itself. But, as we have already seen, McAdam's physical device does not vary at all from those which existed in the prior art. Since there is nothing new in the apparatus, there can be *a fortiori* no invention.

Even assuming, contrary to the evidence, that the idea of using water to defrost at below freezing temperatures was new, there was no invention. Certainly there was no invention in providing a pipe to carry the water into the refrigerated space, a spray head to spray water over the coils, and a drained drip pan below the coils to catch and carry away the water. The “problem” then, if any, was to devise means for draining the supply pipe and spray head immediately following the defrosting period. To do this, McAdam made use of the most obvious means available, an ordinary drain valve. It was and is standard plumbing procedure in every instance where a water pipe is exposed to below freezing temperatures, to provide a stop and drain valve which operates in such a way that the instant the valve is shut off, and the water is no longer moving in the pipe, this valve will allow all the water on the discharge side of the valve and in the freezing zone to drain

able to perform the process may or may not be new or patentable.' ”

Even assuming that McAdam was the first to think of the method of using water to defrost cooling coils in a below freezing atmosphere, the means which he adopted to effectuate his purpose were old. The machinery is old and therefore the patent granted to cover this machinery is invalid.

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The advance or improvement over the prior art must involve more skill and ingenuity than would be possessed by the ordinary mechanic skilled in the trade.

In *R. G. Le Tourneau v. Gar Wood Industries*, (9 Cir., 1945) 151 F. 2d 432, this Court stated at pages 434-5:

“As the Supreme Court explained in *Cuno Engineering Corporation v. Automatic Devices Corporation*, 1941, 314 U. S. 84, 90, 62 S. Ct. 37, 40, 86 L. Ed. 58: ‘We may concede that the functions performed by Mead’s combination were new and useful. But that does not necessarily make the device patentable. Under the statute, 35 U. S. C. § 31, 35 U. S. C. A. § 31, R. S. § 4886, the device must not only be “new and useful”, it must also be an “invention” or “discovery”. * * * Since *Hotchkiss v. Greenwood*, 11 How. 248, 267, 13 L. Ed. 683, decided in 1851, it has been recognized that if an improvement is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art.’ The Court stated further, 314 U. S. at page 91, 62 S. Ct. at page 41, 86 L. Ed. 58, ‘A new application of an old device may not be patented if the “result claimed as new is the same in character as the original result” * * * even though the new result had not before been contemplated.’ ”

The application of this rule has tended to become increasingly strict with the passage of time. This tendency has been noticed and commented upon in *Picard v. United Aircraft Corporation* (2 Cir., 1942), 128 F. 2d 632 at page 636:

“We cannot, moreover, ignore the fact that the Supreme Court, whose word is final, has for a decade or more shown an increasing disposition to raise the standard of originality necessary for a patent. In this we recognize ‘a pronounced new doctrinal trend’ which it is our ‘duty, cautiously to be sure, to follow not to resist’. *Perkins v. Endicott Johnson Corp.*, 2 Cir., 128 F. 2d 208.”

It is apparent that McAdam's device does not measure up to these exacting standards. Since McAdam's patent is for an apparatus, his advance must be found in some mechanical improvement made in the physical apparatus itself. But, as we have already seen, McAdam's physical device does not vary at all from those which existed in the prior art. Since there is nothing new in the apparatus, there can be *a fortiori* no invention.

Even assuming, contrary to the evidence, that the idea of using water to defrost at below freezing temperatures was new, there was no invention. Certainly there was no invention in providing a pipe to carry the water into the refrigerated space, a spray head to spray water over the coils, and a drained drip pan below the coils to catch and carry away the water. The “problem” then, if any, was to devise means for draining the supply pipe and spray head immediately following the defrosting period. To do this, McAdam made use of the most obvious means available, an ordinary drain valve. It was and is standard plumbing procedure in every instance where a water pipe is exposed to below freezing temperatures, to provide a stop and drain valve which operates in such a way that the instant the valve is shut off, and the water is no longer moving in the pipe, this valve will allow all the water on the discharge side of the valve and in the freezing zone to drain

back through the valve (R. 431, 464; Plff's Ex. 102, R. 1296-7).

Moreover, McAdam's combination is a *mere aggregation of parts*. Each of the parts performs precisely the same function in the combination that it does apart from the combination. So long as each element performs some old and well known function, the result is not a patentable combination, but an aggregation of elements, and the patent is invalid for this reason alone.

In the case of *Fernandez v. Phillips*, (9 Cir., 1943) 136 F. 2d 404, the patent in suit was for a means of precooling railway refrigerator cars. Railway cars were cooled by means of ice contained in bunkers which were separated from the rest of the car by bulkheads and the circulation of the air normally produced by convection, the air moving downward in the bunkers as it was cooled by the ice and upward in the body of the car as it absorbed heat from the contents of the car, cooled the car. The patent disclosed an electric fan mounted in a portable panel to be mounted in the upper or lower opening in the bulkhead to force the circulation of the air. The device of an electric fan in a portable panel to be mounted in an opening for purposes of ventilation was old. The combination of such a portable fan with a railway refrigerator car was claimed by the patentee to be new. This Court found the claim invalid and said, at page 406:

“Old elements may be combined into patentable invention, but, ‘so long as each element performs some old and well-known function, the result is not a patentable combination, but an aggregation of elements’. *Richards v. Chase Elevator Co.*, 158 U. S. 299, 15 S. Ct. 831, 833, 39 L. Ed. 991. See, also, *Mantle Lamp Co. v. Aluminum Products Co.*, 301 U. S. 544, 57 S. Ct. 837, 81 L. Ed. 1277. Here, the refrigerator car performs its old function of cooling, and the fan its old function of circulating. . . .”

Finding No. 18 (R. 16) that it required the exercise of inventive faculty to invent the combination as defined by claim 13 of the McAdam patent is without basis in the Record.

A. McAdam Solved No Long Existing Problem

Unable to point to any advance made by McAdam in the *apparatus* used for defrosting, Refrigeration has sought to prove invention indirectly by conjuring up a defrosting "problem" and its solution by McAdam.

The only testimony in the Record upon which to base Finding No. 17 that McAdam solved a problem long existent in the refrigerating art is Jarvis' statement that defrosting "was the biggest problem that the industry had to solve before the present-day frozen food industry could begin to travel" (R. 45).

Chamberlain, assistant chief engineer of York Corporation, denied that this was the fact and stated that "we already had very good means of defrosting, which we still use today" (R. 1020). Indeed, defrosting other than by means of water is by far the most common means. Since 1940 York, one of the largest in the industry, has used water defrosting in only 11% of its units (R. 1031-2).

These common means of defrosting are as follows:

Warm gas—in this method the refrigerating cycle is reversed and the evaporated refrigerant, which is relatively hot as it leaves the compressor, after having accomplished its purpose of absorbing heat in the cooling coils, is returned to the cooling pipes to do the work of melting the frost (R. 1018). This method is more efficient, and usually used only, if there are two or more evaporators in the refrigerating system so that the evaporated gas from one evaporator may be pumped by the compressor into the evaporator which is to be defrosted. This method of defrosting is particularly advantageous as it leaves the coils perfectly dry (R. 1024) as distinguished from water defrosting where a film of ice is frozen onto the coils when the refrigeration is started again (R. 1431, col. 2, lines 50-54). Gas defrosting takes from 10 to 30 minutes, depending on the size of the unit and the amount of frost.

Warm brine—whenever brine is used as the cooling agent it is a simple matter to circulate warm brine inside

the pipes in place of the cool brine and thus melt the frost. This is the accepted method on shipboard. Since 1943 York has installed this type of defrosting in over thirty ships for frozen cargo (R. 1021).

Warm air—air either at atmospheric temperature or heated, may be blown over the pipes by means of air ducts and dampers. Since this takes place within an enclosed unit, the warm air does not get out into the refrigerated space and thus the temperature of that space is not raised. (R. 86, 1008-9). This type of defrosting is used where the unit is conveniently located to a source of outside air and where expensive duct work is not needed (R. 1020). Defrosting will take from 10 to 30 minutes (R. 1010).

Brine spray—where more rapid defrosting is desirable, brine spray is used on the outside of the coils, which defrosts in *two to five minutes* (R. 1017), since in addition to the brine solution imparting its heat to melt the frost, the brine has a solvent action (R. 1021). This brine spray may be continuous or intermittent and is recirculated from a pan located either inside or outside the refrigerated space.

These and a great many variations of these methods of defrosting existed prior to McAdam (Refrigeration's Exs. Y, Z, AA, R. 1509-23) and are still being used extensively today (R. 1017, 1020, 1021). Jarvis' uncorroborated statement as to a "problem" has no foundation. Each method of defrosting, including water defrosting, has its own particular advantages and disadvantages with respect to any one particular job under consideration. The evidence is clear that no one particular kind of defrosting is the best for all purposes. That method which is the most efficient and the least expensive under the particular circumstances is the one which should be used. Under certain circumstances it is undoubtedly true that water is a suitable means for defrosting, but, even in the case of the much-touted use

of Refrigeration's unit during the War (see Finding 15*), the fact is that the unit "was soon found to be inadequate and was replaced by an entirely different type of apparatus" for use by the Armed Forces (R. 1051-52).

B. Increase in the Use of Water to Defrost

Refrigeration also sought and obtained a finding (No. 12*) that the art extensively adopted the system of water defrost of the McAdam patent, apparently as an indication that McAdam had solved a long existent problem.

The only evidence introduced tending to show that there had been any increase in the use of water to defrost was in connection with the growth of defendant, Refrigeration. This growth in the business of Refrigeration was due not only to efficient management and advertising but to the fact that about the time Refrigeration developed this unit, there was a tremendous growth in the frozen food industry and the resultant increase in food storage lockers of small capacities with the result that the use of small blower units increased (R. 1047). Water defrosting for these units was just as feasible as warm gas, warm air or brine. It is quite natural, therefore, that all makes of this type of unit, regardless of the method of defrosting used, should share in this increased business.

C. McAdam's Device Has Not Replaced Other Means of Defrosting

There is no evidence in the Record to support Finding No. 13* that the system of water defrost of the McAdam patent superseded other devices for defrosting. All of the types of refrigerating installations and the various methods of defrosting discussed above, which were known prior to McAdam, are still being used widely and effectively today (R. 1017, 1020, 1021).

* R. 16.

Refrigeration attempted by the introduction of testimony from three satisfied users of its Recold unit to create the impression that because these persons were more pleased with the Recold units than they were with what they had used previously, water defrosting is superior to and has replaced other methods of defrosting. But in every case, the type of refrigeration which was replaced was of the type in which the cooling pipes are strung out around the walls and ceiling of the space to be cooled. All of the reasons given for preferring the Recold unit, such as the fact that it took up less space (R. 169), or that it was unnecessary to remove the goods from the storage space when defrosting (R. 164) *are advantages which accrue from the use of a package type refrigerating unit* with the coils concentrated within a casing irrespective of how it is defrosted. That it was the package type unit which was new and better to them rather than the type of defrosting is illustrated by the testimony of one of the "satisfied users", Lawrence, who stated on cross-examination (R. 133):

"Q. In Defendant's Exhibit V you state, 'The unique system of defrosting using sweet water is accomplished in about 5 minutes' time.' When you say 'unique system' you mean that you hadn't seen one before?

"A. It was different from the ordinary or usual type of coil.

"Q. And what was the difference? How did it differ?

"A. It was a fan type fin coil in comparison with the iron pipe coil that made it unique."

The "fan type fin coil" was of course old (R. 1430, col. 1, lines 22-9; 258; Plff's Ex. 106, R. 1301; 998) and was not invented by McAdam.

None of these witnesses had any basis of experience with respect to other means of defrosting blower units. Two of the three never examined or inquired about a unit of any other manufacturer before they bought the Recold unit

(Lawrence, R. 132; Payne, R. 176), and the third stated he had had no experience with any type of blower unit other than the Recold unit (Johnson, R. 238).

It is evident that this kind of testimony has neither relevance nor competence. It means nothing with respect to supporting the McAdam "invention". It is not claimed by Refrigeration that McAdam introduced the compact type refrigerating coil (R. 246, 255). Nor are the claims of the McAdam patent based upon this idea.

The compact blower unit may have been *new* to Refrigeration and its three customers, but it was old to others connected with the refrigerating industry.

D. Surprise of Unqualified Witnesses Not Persuasive

Three of the Findings by the Court below (Nos. 8, 9 and 10, R. 15) include statements to the effect that the engineers and those skilled in the art did not believe, prior to McAdam, that water could be used to defrost at below freezing temperatures. The testimony upon which these Findings are based did not include that of any refrigeration engineer, except Refrigeration's witness Ruppright. But his testimony can not be taken seriously as a qualified witness, because he testified that water would freeze in pipes and in hose below 25 degrees even while the water was running, and would not defrost, except in a few spots, and would then refreeze (R. 146-7). Thus he denies the operability of McAdam's apparatus at temperatures below 25 degrees at which it is supposed to operate (R. 163).

Doble's unsolicited statement was that he didn't believe the thing would work when it was first presented to him (R. 279). While quite obviously a nimble and accomplished patent expert witness, Doble is certainly not a refrigerating expert and prior to this case was not familiar with the art. Prior to 1937 his only experience in refrigeration other than "that of most people" was that he invented an electrical system of defrosting for his own ice-box (R. 282). Mr. Doble had no experience as a basis for his surprise.

Ruppright, Refrigeration's only refrigerating expert, had written an article, Defendant's Ex. Z (R. 1512-6), published in 1936, in which he stated that water sprayed from a permanent header could be used to defrost at below freezing temperatures "were it not for trouble caused by water freezing in the piping during regular operation". He admitted on cross-examination that he had never tried to defrost in this manner (R. 144). Had he done so it is possible that he, too, would have found it quite simple to use a stop and drain valve as was done at Indianapolis (Plff's Ex. 22, physical), Elmira (Plff's Ex. 39, R. 1207), and Yamhill (Plff's Ex. Y-21, physical) and also later by McAdam, since this is and was common plumbing procedure whenever water piping must enter a below freezing zone (R. 431; Plff's Ex. 102, R. 1295-8).

Refrigeration also produced a Mr. C. L. Walling, a former York employee in a subordinate position, who stated that when he first heard of the Recold unit in 1938, at which time he was employed by York, he considered it unsound (R. 194), but he admitted that he "made no thorough investigation".

W. R. Tuttle, another former York employee, testified (R. 241) that Dalin, district chief engineer for York in its Los Angeles district, had stated to him during 1938 or '39 that water defrosting was an exploded idea and that York had thrown it out years ago. Dalin took the stand and stated that he did not recall ever having made such a statement and did not believe that he could have made it because to his knowledge York had not tried and discarded water defrosting (R. 981). Furthermore it was also brought out that on August 25, 1939, Mr. Dalin, before he had ever seen a Recold unit in operation, approved the purchase of one by York for resale without requiring or obtaining any guarantee from Refrigeration (Plff's Ex. 103, R. 1298; R. 982-3). If Dalin had asserted that water defrosting was an "exploded idea" he would hardly have approved the purchase of such a unit.

Finding No. 10 states that "the teachings of the published art" as well as the belief of the engineers prior to McAdam were that water could not be used for the defrosting of coils positioned within a refrigerated space maintained at a temperature below freezing. This is incorrect. Two of the prior art patents cited by York call for the use of water to defrost coils positioned within a space maintained at temperatures below the freezing point of water (Jensen & Roser, R. 1279; Wenzl, R. 1271). As to the engineers, York introduced in evidence the testimony of a dozen refrigeration engineers who *did* believe and knew by experience that water defrosting would work below freezing (*Supra*, pp. 25, 32-3, 43-5).

E. That Early Purchasers Required Guarantees of Replacement Does Not Prove Invention

Refrigeration introduced evidence that in some of its early installations it was necessary to give guarantees of satisfaction in order to sell the installations. Lawrence, Payne and Johnston testified that they were given guarantees but only Lawrence testified that he *requested* such a guarantee and that was in answer to a leading question (R. 124). It is not surprising for a young company* to give such guarantees in an attempt to obtain business, particularly when two earlier installations of Recold units had proved unsatisfactory. Mr. Jarvis testified (R. 46-7) that after making the first commercial installation in Woodland, Oregon, it was found that "we hadn't entirely solved the problem" and "it was necessary to go into the room with a blow torch and melt the ice inside of the supply pipe that had frozen." Again in connection with another installation, the first made in Los Angeles or the vicinity, Mr. Jarvis testified (R. 64):

"We encountered considerable trouble on this job because we failed to supply sufficient coverage with

* Refrigeration was formed in 1932 (R. 41) but the McAdam development did not come until 1937 and these sales were made in 1939 and 1940 (R. 123, 161, 236).

our spray except on the fin section of the coil and did not supply the water spray over the return bends assuming, I guess, because they were out of the air-stream they would not frost, and consequently we had to take that coil out and build another coil with sprays over the return bends before the job was entirely satisfactory."

With this poor record of engineering and installation practice it is a wonder that more customers did not request and secure guarantees of satisfaction.

F. Sales of the Recold Unit Do Not Support the Alleged Invention.

In an attempt to prove commercial success in order to bolster the claim of invention for the McAdam patent, Refrigeration offered evidence that its 1945 gross sales were about one million dollars, forty percent of which was business in "water defrost coils" (R. 1093). This figure, however, is completely without significance to prove commercial success of the McAdam invention because the "water defrost coil" is not the apparatus patented by McAdam but is merely an unpatented part which anyone is free to sell; and because there are no figures as to the number of installations of water defrosted units in combination with a refrigerated space maintained below freezing, the alleged McAdam invention. Indeed, the figures given for 1945 show that even Refrigeration, which manufactures nothing but coils (R. 41) and has been pushing water defrosting as much as it could for seven years, sold many more coils apparently to be defrosted *by other means than by water* since only 40% of its sales were "water defrost coils".

But quite apart from the above, commercial success, to be any indication of invention, must be the crowning glory on the story of a long felt want, caused by a problem incapable of solution for years, and an immediate and enthusiastic reception by a waiting public. These conditions do not exist in the present case. As already pointed out, there were many methods of defrosting, all of which are still used, and

used much more commonly even today than the water defrosting (R. 1008, 1014, 1017). There is absolutely no evidence in the record of the problem remaining unsolved with failures strewn along the wayside. On the contrary, it is clear from the prior uses previously discussed that water defrosting was known and was successfully used. And such success as water defrosting has had has not been due to the inventive character of the development, but to the fact that about the time of the filing of McAdam's application small blower units became more popular because of the increased use of frozen foods and smaller storage rooms. In some of such installations, particularly where there was only one evaporator so that gas defrosting was inefficient, water defrosting was handy and was adopted (R. 1024, 1031-2).

The most that can be said is that Refrigeration was early in merchandising a compact blower type unit having a method of defrosting, which had been known and used many years before, but which has been useful in view of the current commercial situation. As a recompense for Refrigeration being wide awake and progressive it has made substantial sales. But its business acumen certainly cannot be used as an argument for supporting the inventive character of the McAdam apparatus.

And as clearly recognized by this Court in *Grayson Heat Control v. Los Angeles* (1943), 134 F. 2d 478, at page 481:

“Lack of novelty and lack of invention being clearly shown, no significance attaches to the fact, if it be a fact, that utility resulted and commercial success followed from what Grayson did.”

IV. York Does Not Infringe the McAdam Patent

It is axiomatic that in order to infringe a claim of a patent one must make, use or sell *all* of the elements of the claim. *Simons v. Davidson Brick Co.* (9 Cir., 1939), 106 F. 2d 518 at page 523:

“. . . The omission of an element of the combination avoids infringement, (*Rowell v. Lindsay*, 113

U. S. 97, 5 S. Ct. 507, 28 L. Ed. 906; *Black Diamond Coal Mining Co. v. Excelsior Coal Co.*, 156 U. S. 611, 15 S. Ct. 482, 39 L. Ed. 553; *Magnavox Co. v. Hart & Reno*, 9 Cir., 73 F. 2d 433, *supra*), unless an equivalent is supplied.”

There are no Findings of Fact as to the apparatus which York sold, or as to any fact basis for infringement by York. There is merely the bare Conclusion of Law that claim 13 is infringed (R. 23).

The evidence with respect to the apparatus which York sold is contained in a Stipulation printed on pages 1527-29 of the Record (Dft's Ex. CC).

What the stipulation shows (R. 1527-29) is that York sold certain “refrigerating units” (R. 1528), the structure of these “standard sectional coil units” being illustrated and described. The stipulation also provides that York supplied “water defrosting connections with its standard sectional coil unit, where the unit was installed to maintain a temperature well below freezing in the refrigerated space” (R. 1528). But there is no proof that York *made, used or sold* the “refrigerated space” which is specified in each claim except claims 9 and 12, and such claims are clearly invalid. The charge here is of direct, not contributory, infringement. Refrigeration must prove that York has made, used or sold *each* element of the claims. Refrigeration has the burden of proving that York made, used or sold not only a water defrosted refrigerating unit, but also *a refrigerated space kept continuously below freezing*. There is absolutely no such proof and Refrigeration has not sustained its burden.

There is also no proof that York's water defrosted commercial installations use “finned” coils, called for in claims 10 and 11, or an electrically operated valve, called for in claim 14.

York does not make, use or sell all of the elements of the patented combination and therefore it does not infringe the McAdam patent.

V. Refrigeration Has Misused the McAdam Patent and Should Be Barred from Relief.

In the event that this Court finds the McAdam patent invalid or not infringed then it will be unnecessary to consider the question of Refrigeration's misuse of the patent, but if the patent is found to be valid and infringed, then Refrigeration is barred from enforcing the patent because of its "unclean hands" arising from a misuse of the patent. Proof of the misuse was first brought out during the cross-examination at the trial of Jarvis, vice president and general manager of Refrigeration. At the close of its case and prior to rebuttal by Refrigeration, York moved to amend its pleadings to include this issue, which motion was denied (R. 1053-1063) in spite of the liberal rules allowing amendments to pleadings, and in spite of the Court's right *sua sponte* to consider a defense of "unclean hands."

It is clear from the cases, however, that it is not necessary for this issue to be raised by the pleadings and that at any time the Court may act *sua sponte* and deny relief. A recent case to this effect is *Frank Adam Electric Co. v. Westinghouse Electric Mfg. Co.*, (8 Cir., 1945) 146 F. 2d 165, where it was stated at page 167:

"* * * The rule is firmly established that whenever in the course of the proceeding the court is informed in any way that the plaintiff is without clean hands, that it is using the monopoly of the patents in suit to restrain competition on unpatented things in violation of law, the court should inquire into the facts of its own accord, and if it finds the charge to be true relief should not be granted."

That Refrigeration is misusing the McAdam patent is established by the admissions of Jarvis and Refrigeration's patent expert Doble. Without contradicting and thus impeaching its own witnesses there is no evidence which Refrigeration could introduce which would alter this situation. All the facts which are necessary for a determination of this

issue are now in this Record and it is therefore within the province of this Court to consider and apply the doctrine of "unclean hands."

The McAdam patent is a combination patent. Each claim of the patent, if valid, covers only the combination of *all* of the elements recited in that claim. Any one element or any combination of elements *less* than *all* of the elements recited in the claim is, therefore, unpatented. This was clearly stated in *Mercooid Corp. v. Mid-Continent Co.*, 320 U. S. 661 (1944) at page 667:

"* * * The patent is for a combination only. Since none of the separate elements of the combination is claimed as the invention, none of them when dealt with separately is protected by the patent monopoly. *Leeds & Catlin Co. v. Victor Talking Machine Co.* (No. 1), 213 U. S. 301, 318. Whether the parts are new or old, the *combination* is the invention and it is *distinct* from any of them. See *Schumacher v. Cornell*, 96 U. S. 549, 554; *Rowell v. Lindsay*, 113 U. S. 97, 101 * * *."

All of the claims of the McAdam patent, except claims 9 and 12, include as an element of the combination "a refrigerated space." By the admission of Refrigeration's patent expert, Doble, this refrigerated space is an important element of the claims because it imports into the claims from the specification of the patent the fact that the defrosting device is used in or in connection with a refrigerated space below the freezing point of water (R. 277-8). Without this element, claims 9 and 12 are obviously anticipated by the prior uses even assuming, contrary to the facts, that the prior use devices were not used below freezing.

Refrigeration does not install the refrigerating units which it sells (R. 79-81) and it does not sell any "refrigerated space." Its sales consist of the blower type refrigerating units alone and not "in combination with a refrigerated space." Nor does Refrigeration sell the supply and drain conduits (R. 79), which are admittedly important elements of the patented combination (R. 221).

It follows then that the Recold unit sold by Refrigeration does not include *all* of the elements of the combination. The unit which it sells is therefore an unpatented product.

Refrigeration's counsel admitted at the trial that:

“The evidence clearly shows that perhaps we are selling less than we are entitled to under the combination and giving a license to use the rest of it” (R. 1055).

Refrigeration misuses the McAdam patent in at least two ways:

a) Refrigeration and its licensees, by law, impliedly grant a license under the McAdam patent to all who purchase the unpatented water defrosting unit from them. That Refrigeration intended that such a license be granted is shown by the fact that it has never sued for infringement any user or seller of a water defrosting device which was purchased from it or from one of its licensees, but it has sued for infringement non-licensed manufacturers and their customers (R. 89). For example, so long as York purchased the unpatented Recold units from Refrigeration and resold them, Refrigeration did not sue York for infringement. Now, however, that York itself manufactures and sells water defrosting devices it has been charged with infringement by Refrigeration.

By this course of conduct, Refrigeration is illegally using the McAdam patent to control competition in an unpatented product by attempting to compel the trade to purchase from it the unpatented device, that is, the Recold unit alone without conduits and without the refrigerated space.

b) There is no proof that York uses or sells its water defrosting device in combination with “a refrigerated space.” Since the patented combination includes as an element “the refrigerated space,” which York does not sell, York sells an unpatented product and is not an infringer. At most it can be charged to be only a contributory infringer. But the mere bringing of a suit against a contributory infringer is a misuse of the patent by attempting to place an

illegal restraint upon an unpatented product. See the *Mercoïd* cases discussed below, and *Stroco Products, Inc. v. Mullenbach*, 67 USPQ 168, 170 (D. C. S. D. Cal., 1944), where the Court found:

“1. Plaintiff is, by its action against defendants for contributory infringement, attempting to use its patent to secure a monopoly on unpatented portions of the complete combination covered by the claims of its patent.”

Prior to the cases of *Mercoïd Corp. v. Mid-Continent Co.*, 320 U. S. 661 (1944), and *Mercoïd Corp. v. Honeywell Co.*, 320 U. S. 680 (1944), the above misuses of patents were recognized and condemned where a patent for a machine or process was being used to secure a partial monopoly in supplies or unpatented materials used in the process or by the machine.* The *Mercoïd* cases merely extended the misuse doctrine to include those cases in which “the unpatented * * * device is itself an integral part of the structure embodying the patent” (320 U. S. 665), which is precisely the case here.

In the *first Mercoïd* case, *Mid-Continent*, the patent owner, exclusively licensed Minneapolis-Honeywell, a manufacturer of less than the entire combination, who in turn sub-licensed various other manufacturers of less than the entire patented combination. Neither *Mid-Continent* nor *Minneapolis-Honeywell* installed the entire combination, nor did either sell the entire combination, but the latter did sell a portion of the entire patented combination. *Mid-Continent* sued *Mercoïd* for contributory infringement, because of its sale of *part* of the patented combination. The Supreme Court held this to be a misuse of the patent and stated (320 U. S. 661, 667):

“* * * the competition which is sought to be controlled is not competition in the sale of the patented

* *Carbice Corp. v. American Patents Corp.*, 283 U. S. 27 (1931); *Leitch Mfg. Co. v. Barber Co.*, 302 U. S. 458 (1938); *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U. S. 488 (1942); *B. B. Chemical Co. v. Ellis*, 314 U. S. 495 (1942).

assembly but merely competition in the sale of the unpatented thermostatic controls. The patent is employed to protect the market for a device on which no patent has been granted."

The argument was made that the portion of the combination sold by both Minneapolis-Honeywell and Mercoid was the "heart of the invention," which fact should justify protection of the patentee and its licensees. But the Supreme Court rejected this contention, pointing out that "the patent is employed to protect the market for a device on which no patent has been granted" (at p. 667). It further said (at p. 667):

"That result may not be obviated in the present case by calling the combustion stoker switch the 'heart of the invention' or the 'advance in the art'. The patent is for a combination only. Since none of the separate elements of the combination is claimed as the invention, none of them when dealt with separately is protected by the patent monopoly * * * Whether the parts are new or old, *the combination is the invention and it is distinct from any of them.*"

The *second Mercoid* case (320 U. S. 680) involved precisely the same situation as to another combination patent. The facts are perhaps closer to our own case in that the intermediate step of a license from the patent holder to an exclusive licensee was not involved. Also, this was a declaratory judgment suit in which the defendant countered with a charge of infringement as well as contributory infringement. The Court stated (at p. 684):

"* * * The fact that an unpatented part of a combination patent may distinguish the invention does not draw to it the privileges of a patent. That may be done only in the manner provided by law. However worthy it may be, however essential to the patent, *an unpatented part of a combination patent is no more entitled to monopolistic protection than any other unpatented device.* For as we pointed out in *Mercoid v. Mid-Continent Investment Co.*, *supra*, *a patent on a combination is a patent on the assembled*

or functioning whole, not on the separate parts. The legality of any attempt to bring unpatented goods within the protection of the patent is measured by the anti-trust laws not by the patent law. For the reasons stated in *Mercoïd v. Mid-Continent Investment Co.*, supra, the effort here made to control competition in this unpatented device plainly violates the anti-trust laws, even apart from the price-fixing provisions of the license agreements. * * *

The evil which is condemned in both cases is the attempt to use a combination patent so as to give an economic advantage in the market to an unpatented product which is itself an integral part of the combination.

As pointed out above, Refrigeration is illegally using its combination patent to induce purchasers to buy from it or from its licensees a device which is admittedly less than the entire combination and, therefore, an unpatented product. Refrigeration is misusing its patent and should be barred from recovery.

VI. Costs and Attorney's Fees Should Not Be Allowed.

Paragraphs 7 and 9 of the Judgment herein (R. 25-6) award to Refrigeration reasonable attorney's fees and costs.* In its Points on appeal (No. 20, R. 1113) York stated that the District Court erred in not holding that this action was filed with justification in law and in fact.

Here York sought a declaratory judgment as to the invalidity of fourteen claims of the McAdam patent and *thirteen of these claims were declared invalid*. It would appear that there is a question as to which party prevailed. Certainly it indicates that the action was instituted with justification in law and in fact.

* Costs in the amount of \$744.70 were taxed and passed to judgment (R. 37), but the matter of the attorney's fees was held in abeyance pending the determination thereof by a Special Master (R. 37). The reference to a Master was stayed pending the appeal by paragraph 10 of the Judgment (R. 26).

As amended August 1, 1946, R. S., § 4921, 35 USCA, § 70 states in part (Appendix, p. 79) :

“ . . . The court may in its discretion award reasonable attorney's fees to the prevailing party upon the entry of judgment on any patent case.”

As interpreted by the courts, the above quoted portion of the statute relating to the granting of attorney's fees applies only when the action by the plaintiff is absolutely unwarranted or unreasonable.

In *Lincoln Electric Co. v. Linde Air Products Co.* (D. C. N. D., Ohio, 1947), 75 USPQ 267, a suit by plaintiff on a patent had been dismissed on a motion for summary judgment based on the misuse of the patent. In denying a motion by defendant for reasonable attorney's fees, the Court said at pages 267-8:

“The request for attorneys' fees is based on a recent enactment of Congress, Title 35 U. S. C. 70. * * * It is apparent from the wording of the statute and its history that an award of attorneys' fees should not be made in an ordinary case. The Court is invested with discretionary power where it is necessary to prevent gross injustice. The case at bar presents a situation which is not unusual in patent matters. This court finds no special circumstances of gross injustice. * * * This court does not consider that the action by the plaintiff was absolutely unwarranted or unreasonable. Since the award asked by the defendant is contrary to long established practice, a clear showing of the conditions indicated in the statute must be made to entitle the applicant to the relief sought. The circumstances and conditions surrounding the parties in this litigation do not warrant an award of attorneys' fees to the prevailing party.”

This interpretation of the statute is in line with a long line of decisions interpreting a similar provision in the copy-right laws (35 Stat. 1084, 17 USCA, § 40). Judge Yankwich said in *Cain v. Universal Pictures Co.* (D. C. S. D., Cal., 1942), 47 F. Supp. 1013, at page 1019:

“The allowance of attorney’s fees in copyright cases to the prevailing party is discretionary. 17 U. S. C. A., § 40; *Marks v. Leo Feist, Inc.*, 2 Cir., 1932, 8 F. 2d 460, 461; *Buck v. Bilkie*, 9 Cir., 1933, 63 F. 2d 447. They should not be awarded unless equity considerations exist which call for the penalization of the losing party.”

Because York prevailed as to thirteen of the fourteen claims of the McAdam patent, the District Court also erred in awarding costs to Refrigeration. A more equitable disposal of the matter would have been to award thirteen-fourteenths of the costs to York, or at the most to have awarded costs to neither side.

Conclusion

The District Court’s determination of validity and infringement of claim 13 should be reversed and its holding of invalidity of the remaining claims of the McAdam patent should be sustained; Refrigeration’s cross-claim should be dismissed; Refrigeration should be adjudged to have misused the McAdam patent and be therefore barred from enforcing it; and the prayers of York’s complaint should be granted.

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January 29, 1948.

APPENDIX

Judicial Code Section 274d; 28 USCA, §400:

“(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

“(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

“(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.”

R. S. §4886; 35 USCA, §31:

“Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, or who has invented or discovered and asexually reproduced any distinct and new variety of plant, other than a tuber-propagated plant, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any

foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor.”

R. S. §4888; 35 USCA, §33:

“Before any inventor or discoverer shall receive a patent for his invention or discovery he shall make application therefor, in writing, to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. The specification and claim shall be signed by the inventor. No plant patent shall be declared invalid on the ground of non-compliance with this section if the description is made as complete as is reasonably possible.”

R. S. 4921; 35 USCA, §70:

“The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a judgment being rendered in any case for an infringement the complainant shall be entitled to recover general damages which shall be due compensation for

making, using, or selling the invention, not less than a reasonable royalty therefor, together with such costs, and interest, as may be fixed by the court. The court may in its discretion award reasonable attorney's fees to the prevailing party upon the entry of judgment on any patent case.

“The court is hereby authorized to receive expert or opinion evidence upon which to determine in conjunction with any other evidence in the record, due compensation for making, using, or selling the invention, and such expert or opinion evidence is hereby declared to be competent and admissible subject to the general rules of evidence applicable thereto.

“The court shall assess said damages, or cause the same to be assessed, under its direction and shall have the same power to increase the assessed damages, in its discretion, as is given to increase the damages found by verdicts in actions in the nature of actions of trespass upon the case; but recovery shall not be had for any infringement committed more than six years prior to the filing of the complaint in the action. And it shall be the duty of the clerks of such courts within one month after the filing of any action, suit, or proceeding arising under the patent laws to give notice thereof in writing to the Commissioner of Patents, setting forth in order so far as known the names and addresses of the litigants, names of the inventors, and the designating number or numbers of the patent or patents upon which the action, suit, or proceeding has been brought, and in the event any other patent or patents be subsequently included in the action, suit, or proceeding by amendment, answer, cross bill, or other pleading, the clerk shall give like notice thereof to the Commissioner of Patents, and within one month after the decision is rendered or a judgment issued the clerk of the court shall give notice thereof to the Commissioner of Patents, and it shall be the duty of the Commissioner of Patents on receipt of such notice forthwith to endorse the same upon the file wrapper of the said patent or patents, and to incorporate the same as a part of the contents of said file or file wrapper.”

35 Stat. 1084; 17 USCA, §40:

“In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney’s fee as part of the costs.”

No. 11642.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

YORK CORPORATION,

Plaintiff-Appellant and Cross-Appellee,

vs.

REFRIGERATION ENGINEERING, INC.,

Defendant-Appellee and Cross-Appellant.

REPLY BRIEF OF REFRIGERATION
ENGINEERING, INC.

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This was the problem McAdam solved and the patent is addressed to this problem and to nothing more or less.

Read in the light of the patent's description the "refrigerated space" must be one that presents this problem. This is the intent of the agreement resulting from the negotiations formulative of the patent contract according to the established principles of law. This intention controls the patent's interpretation. McAdam never abandoned such an interpretation

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ENGINEERING, INC.**

Summary of Argument.

1. The McAdam patent specifically distinguishes the invention as applicable to tap water defrosting of a coil within a refrigerated chamber constantly maintained at temperatures below the freezing point of water.

This was the problem McAdam solved and the patent is addressed to this problem and to nothing more or less.

Read in the light of the patent's description the "refrigerated space" must be one that presents this problem. That is the intent of the agreement resulting from the negotiations formulative of the patent contract according to the established principles of law. This intention controls the patent's interpretation. McAdam never abandoned such an interpretation.

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 - a. The Gayley Dry Blast installation.
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 - c. The Swift & Co. installation at Elmira.
 - d. The Yamhill installation.

ARGUMENT.

The Error, in Fact and in Law, of York's Contention That the Patent Office Proceedings Preclude by Estoppel "That the Refrigerated Space of the Claims Means 'A Refrigerated Space Always Maintained Below Freezing.'"

This contention has no applicability to Claim 13 (adjudged valid and infringed) or to Claims 10 and 11. The mode of operation of the combination defined in each of these claims is dependent upon the air of the refrigeration space not rising above the freezing point of water during the time required for defrosting. [IV-1432, McAdam Patent, p. 4, col. 2, Claim 10, lines 8-11, Claim 13, lines 43-45]. It could not be *above* the freezing point of water if it is to be prevented from rising above such temperature.

Letters Patent are a contract between the United States Government and the patentee (*National Hollow B.B. Co. v. Interchangeable B.B. Co.*, 106 F. 693 (C.C.A. 8); *O'Brien-Worthen Co. v. Stempel*, 209 F. 847, 852 (C.C.A. 8)).

"A patent is subject to the same general rules of construction as other contracts."

(Deller's Walker on Pats., Vol. II, §240, p. 1204, citing cases).

It is well settled that the scope of such agreement is limited by its terms as *finally* agreed upon between the inventor and the Patent Office.

The Patent Law [U.S.R.S. 4888, 35 USCA §33, cf. App. p. 1]* requires that "* * * in case of a machine,

*Reference is to the accompanying Appendix.

he shall explain the *principle* thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; * * *". (Emphasis supplied.) In compliance with this statute, the McAdam patent [p. 1, lines 1-14] particularizes that the refrigerated space must be constantly maintained at temperatures below the freezing point of water. The application of this principle distinguishes it from prior inventions. To be a machine or apparatus embodying and utilizing McAdam's invention so explained, such a machine must be based upon this stated principle. To provide a machine working upon this principle was the unsolved problem in the refrigeration art.

All of the original application claims (1-14) were rejected [first Office action, IV-1348] on the patent to Kagi [IV-1471]. This Kagi patent was the only prior patent relied upon by the Examiner in rejecting these claims at any time.*

In McAdam's response to this rejection he pointed out that "* * * all of the claims call for a space which is *constantly maintained* below the freezing point of water, * * *" [IV-1353; see App. p. 5 for complete notation]. This interpretation of the claims was consistently maintained by McAdam to the grant of the patent and is consistent with his statement of the principle upon which his novel combination is grounded.

*" * * it has long been settled that where references in the record were before the Patent Office and were rejected as anticipations the presumption of novelty and invention which arises from the grant of the patent is greatly strengthened. (Citing cases.)" (*General Electric Co. v. Saxe Sales Co.*, 82 F. (2d) 100, at 103 (C. C. A. 6).)

Thereafter, on his second action, the Examiner stated:

“Applicant has attempted by amendment to differentiate his claims over the prior art cited by stating that his device *continuously* maintains a freezing temperature below the freezing point of water. However, such limitation is immaterial insofar as patentability is concerned since practically all refrigeration systems continuously maintain a predetermined temperature which may be above 32° or below 32° depending upon the particular requirements placed upon the system. However, such regulation or particular degree of temperature maintained is not of patentable import.” [IV-1368].

Although the words, “the air of which is continuously maintained at a temperature below the freezing point of water” were cancelled from claims 1, 2 and 3 [IV-1371], 7 and 9 [IV-1372], because the Examiner ruled that said words constituted an immaterial limitation, adding “However, such regulation or particular degree of temperature maintained is not of patentable import”, McAdam never changed his position that the newly invented mode of operation of his invented combination was dependent upon the temperature of the air in the refrigerated space being below the freezing point of water. McAdam took issue with the Examiner’s statement that “such regulation or particular degree of temperature maintained is not of patentable import.” He supplied the affidavits of James W. Hatch, Walter F. Hancock, D’Artagnan T. Ward, William L. Holladay, Robert E. Woods, and Joseph H. Batteiger [IV-1378-1402].

After full consideration of these affidavits, the Examiner stated:

“The six affidavits submitted by applicant have been noted by the Examiner and filed in the application.

It is obvious that if the water supply in Kagi was confined in a space the temperature of which was maintained at below 32° that the pipe would freeze, but it is also obvious that to prevent such freezing the valve would be vented and the valve would be placed outside the freezing chamber. Such remedy would be obvious and would not amount to patentable import. Vented valves have long been known in the arts for just such purpose.” [IV-1408, emphasis supplied].

Thus the Examiner reversed his holding of immateriality. This reversal would have been unnecessary had the Examiner not considered that in view of McAdam’s specification the term “refrigerated space” as used in the claims then under consideration was to be interpreted so as to include the principle and mode of operation of McAdam’s combination so dependent upon said “particular degree of temperature so maintained,” *i. e.*—that the air in the space was maintained below the freezing point of water.

The McAdam application and the patent as issued made this refrigerated space as so interpreted of the very essence of the McAdam invention. (Cf. *General Motors Corp. v. Kestling*, C.C.A. 8, 164 F. (2d) 821.) It specifically points out that the novel mode of operation of the McAdam combination is dependent upon this. It states:

“My invention relates to low temperature refrigeration where a space is required to be constantly maintained at temperatures below the freezing point of water, and the invention relates more particularly to methods and devices for defrosting the coils or heat transfer surfaces used in maintaining such conditions.

Where the air which is being recirculated over these low temperature surfaces never rises above the freezing point of water periodic defrosting under main-

tained low temperature conditions has presented many problems. It is an object of this invention to provide simple and highly effective means for so defrosting.”

[IV-1429, McAdam Patent, p. 1, lines 1-14].

The Rules of the Patent Office provide:

“Rule 71. The specification and drawing must be amended and revised when required, * * * to secure correspondence between the claim, the specification and the drawing * * *”.

In allowing the patent claims, the Examiner obviously considered (as did McAdam) that McAdam’s quoted statements of the principle of his invention was “a space is required to be continuously maintained at temperatures below the freezing point of water”. At no time did the Examiner, after the cancellation of “the air of which is continuously maintained below the freezing point of water” object to this specific statement and requirement of the patent specification. Nor did the Examiner require the specification to be restricted to correspond with the claims, as it would have been necessary to do had the Examiner intended that this requirement be eliminated from the interpretation of the claims.

In the affidavits submitted by McAdam to controvert any assumption by the Examiner that the McAdam combination was not patentably inventive over the Kagi patent disclosure, the affidavit of Hancock points out that the device of the Kagi patent is “inoperative for the purposes for which the said McAdam device is intended in that water will not properly drain from the irrigator or spray head ‘k’ and will remain in the conduit leading thereto and in the ports or chambers of the valve ‘1’ so that when the temperature of the air adjacent the coil ‘a’ and surround-

ing said valve, spray head and conduits respectively, is below the freezing point of water same will freeze and solidify in position and will prevent the subsequent use of the device for the purpose of defrosting with water.” [IV-1383-84].

Hancock further stated:

“I have personally operated a device invented by McAdam and have found it to be fully operative to supply water to a coil situated in a box known to me to have been at a temperature at least 25 degrees below the freezing point of water and not higher than 7 degrees Fahrenheit continuously for 12 hours prior to my operation of the device and that after having operated the device the same to my knowledge became so thoroughly drained that after another lapse of 4 hours during which the temperature within the box in which the coil and device were located never rose above 7 degrees Fahrenheit I was able to again operate and did again operate the device for defrosting of said coil and found that the second operation as well as the first operation was not interfered with by the presence of ice in its conduits, spray head or the like.

It is my opinion that the device of Kagi is useless for water defrosting under the same conditions and that after use in a freezing atmosphere it would be impossible to move the valve ‘l’ to open position and if such were done by thawing same the device would still be inoperative and water would not flow through the conduit so long as the temperature in the space enclosing the spray head ‘k’ and the attached conduit was at a temperature below the freezing point of water.” [IV-1384-85].

Hatch [at IV-1379], refers to the fact that his company “* * * has been confronted with a demand for coils which could be defrosted without allowing the temperature of the freezing compartment to rise above the freezing point of water.” And at page 1380, again refers to the freezing compartment maintained below the freezing point of water.

See Holladay affidavit [IV-1391-94]; Woods affidavit [IV-1395-98]; Batteiger affidavit [IV-1399-1402].

These affidavits were presented in the McAdam application to point out the distinctive principle of the McAdam invention and the total lack thereof in the Kagi patent disclosure. The Kagi patent was the sole basis of the Examiner's rejection. These affidavits make comparisons which demonstrate that McAdam did not abandon his assertion that the novel principle of his apparatus resided in the refrigerated space being maintained at a temperature below the freezing point of water and that when provision was made for continuous drainage thereof, the spraying over the refrigerating coils of tap water at ordinary ground temperature would melt the ice and frost adherent to the coils.

The Examiner's final rejection [IV-1408] above quoted was not based upon the Examiner's assertion that the temperature of the air in the refrigerated space was immaterial. It was based upon his (subsequently abandoned and withdrawn) assertion that “It is obvious that if the water supply in Kagi was confined *in a space the temperature of which was maintained at below 32°* that the pipe would freeze, but it is also obvious that to prevent such freezing the valve would be vented and the valve would be placed outside the freezing chamber. Such remedy would

be obvious and would not amount to patentable import. Vented valves have long been known in the arts for just such purpose." (Emphasis supplied.)

Upon such final rejection McAdam appointed attorneys to represent him. An oral hearing was had; the substance thereof was engrossed in a final paper of submission of the McAdam application [IV-1414-20]. Thereupon the McAdam application was allowed [*id.* 1423].

Such an interpretation of the terms and provisions of the patent is required as will give such effect to the Patent Office proceedings to reflect the true intention of the parties. It is clear that McAdam never abandoned but continuously insisted that the patentable novelty of his combination inhered in the refrigerated space being maintained at a temperature below the freezing point of water; that with such a refrigeration of the space, his combination solved the problem of defrosting the coil by the use of ordinary tap water at normal ground temperatures.

"The object of the patent law is to secure to inventors a monopoly of what they have actually invented or discovered, and it ought not to be defeated by a too strict and technical adherence to the letter of the statute, or by the application of artificial rules of interpretation." (*Topliff v. Topliff*, 145 U.S. 156, 171.)

The affidavits of Hatch, Hancock, Ward, Holladay, Woods and Batteiger contain many references to the difficulties encountered "where the freezing compartment was maintained below the freezing point of water * * *" [IV-1380]. An example of the fact that Hancock, although actively engaged in the refrigeration business commercially as superintendent and chief engineer of Bedell

Eng. & Refrigeration Eng. for 12 years prior to December 1939, states that:

“During this period I had never seen, nor had I ever on good authority heard, of any attempt to defrost refrigeration coils operating in an enclosed, refrigerated, space constantly maintained considerably below the freezing temperature of water, until I witnessed the performance of a device known to me to have been invented by the above mentioned Harry H. McAdam, which device after spraying water over a frosted coil acts to then drain all conduits, spray head, drip pan and the like so completely that no water remains to freeze to clog the device.”

[IV-1383; cf. Ward, 1387; Holladay, 1391; Woods, 1395; Batteiger, 1399].

Without regard to these facts of the instant case, York's brief (p. 14) culls two extracts from the opinion in *Schriber-Schroth Co. v. Cleveland Trust Co.*, 311 U.S. 211 (pp. 220, 221).

York's brief places an erroneous interpretation upon the quoted pages—an interpretation which is not in accord with the facts of the case as recited by the Supreme Court. In the *Schriber-Schroth* opinion there is nothing from which it can even be inferred that the Supreme Court by that decision intended to pronounce any new rule of patent interpretation or to reverse any principle theretofore established by that court. There is inherent in this opinion no ruling that the subsequent grant of a claim broader than any rejected claim is to be limited by file wrapper estoppel. The subsequent allowance of such broader claim is cogent evidence that upon reconsideration the Examiner has adjudged the applicant entitled to a broader claim than he had theretofore considered the applicant entitled to. And

the patent is to be so construed to accord with the intention of the parties to the contract. Nor does this *Schriber-Schroth* opinion, or any decision cited therein, adjudge that the "refrigerated space" specified in a combination is not required to be of the kind and operated under the conditions specified in the specification as defining the kind of an operation upon which the newly invented combination is based.

Does appellant, in York's brief, intend to assert that in the *Schriber-Schroth* decision the Supreme Court intended to overrule its decision in *Smith v. Snow*, 294 U.S. 1, wherein, at page 16, it said:

"It is of no moment that in the course of the proceedings in the Patent Office the rejection of narrow claims was followed by the allowance of the broader Claim 1. *Westinghouse Electric & Mfg. Co. v. Condit Electrical Mfg. Co.*, 194 F. 427, 430 (C.C.A. 2d)."

In this *Smith v. Snow* opinion an argument that the rejection and cancellation of narrower claims than Claim 1 constituted a surrender of scope and interpretation, a restriction of the broader allowed and granted broad Claim 1, was thus repudiated by the Supreme Court. We submit there is nothing in the *Schriber-Schroth* opinion evidencing any intention to reverse or modify or restrict this *Smith v. Snow* statement of the law. It is true that at the trial of this *Smith v. Snow* case there was no attempt by the patentee to broaden the scope of Claim 1 by dropping from it an element which he was compelled to add in order to secure the allowance of that claim, nor in this case *sub judice* is there any such attempted broadening of any of the McAdam patent claims. At page

221 of 311 U.S., in the *Schriber-Schroth* opinion the following language appears:

“True, the rule is most frequently invoked when the original and cancelled claim is broader than that allowed, but the rule and the reason for it are the same if the cancelled or rejected claim be narrower.”

What the court in the last clause of the above quotation refers to is that it does not make any difference in law whether the original and cancelled claim was a broad claim or a narrower claim,—*not* that the cancellation of a narrow claim can estop the patentee from a broad interpretation of a granted broad claim. This is only a repetition of the familiar rule stated in *Smith v. Snow*, 294 U.S. at p. 15, that:

“It is a familiar rule that a patentee cannot broaden his claim by dropping from it an element which he was compelled to add in order to secure his patent. *I.T.S. Rubber Co. v. Essex Rubber Co.*, 272 U.S. 429, 443. 71 L. Ed. 335, 342, 47 S. Ct. 136; *Smith v. Magic City Kennel Club*, 282 U.S. 784, 789, 790, 75 L. Ed. 707, 712, 51 S. Ct. 291.”

It is thus seen that York's second quotation from the *Schriber-Schroth* opinion merely states that the doctrine of file wrapper estoppel applies equally to a broad claim or to a narrow claim; that the rule is “* * * that a patentee cannot broaden his claim by dropping from it an element which he was compelled to add in order to secure his patent.” (*Smith v. Snow*, 294 U.S. 1, 14, 15.) That the *Schriber-Schroth* opinion does not modify or

extend this rule is further made clear from a consideration of the discussed facts of such case [cf. App. p. 1].

“The claims must be read in the light of the disclosure of the specification, not to restrict the invention to the precise structure disclosed, but to grasp the invention in order properly to measure the range of equivalents. (*Flowers v. Magor Car Corporation*, 65 F. (2d) 657, C.C.A. 3 (1933).) While the description may limit a claim, which must always be read in the light of the prior art (see *Pelton v. American, etc., Co.*, 239 Fed. 320, 321, C.C.A. 2 (1916), and can never expand it (see *Fowler v. McCrum, etc., Co.*, 215 Fed. 905, 909, C.C.A. 2 (1914), a patent (*i. e.*, a claim) can never be given a construction broader than its terms in order to cover something which might have been claimed but was not. (*Universal, etc., Co. v. Sonn*, 154 Fed. 665, C.C.A. 2 (1907).) *But the claims whenever possible are to be constructed so as to cover the real invention as found in the specification and drawings, and this is particularly so in the case of a meritorious invention.* (*Mossberg v. Nutter*, 135 Fed. 95, 99, C.C.A. 1 (1905); *Elec. Candy Mach. Co. v. Morris*, 156 Fed. 972, 973-74, C.C., E.D. Mo. (1905); *Malignani v. Jasper Marsh, etc., Co.*, 180 Fed. 442, 454, C.C. Mass. (1910); *Victory Belt Co. v. Marshall Field & Co.*, 300 Fed. 67, 71, C.C.A. 7 (1924); *Cadwell v. Firestone Tire & Rubber Co.*, 13 F. (2d) 483, D.C. E.D. N. Y. (1926); *Sun Ray Gas Corp. v. Bellows-Claude Neon Co.*, 49 F. (2d) 886, 888, C.C.A. 6 (1931).)”

(Deller's Walker on Patents, Vol. II, §261, pp. 1243-44. Emphasis supplied.)

The specification is for the purpose of full explanation of the real invention and it is “in the Light of the Description” that the claims must be read to correctly grasp the invention. (*Flowers v. Magor Car Corporation*, 65 F. (2d) 657-58.)

It is the constantly-maintained below-freezing temperature of the air in the refrigerated space which presents the problem of defrosting by tap water. This requires continuous draining of the melted ice and frost during the defrosting operation. This is stressed in the McAdam patent. *McAdam never abandoned* his assertion that this was the combination which constituted his invention*—not something else. Whatever was the reason for the Examiner’s original holding that the maintenance of such a constant freezing temperature was immaterial, the fact remains that the McAdam patent as granted specifically and emphatically complied with the requirements of R.S.U.S. 4888, not only in pointing out the principle of his invention, but in differentiating his combination from prior defrosting operations as designed for defrosting where the refrigeration coil is located in a chamber constantly maintained at or below 32° F.; that it was to such an operation that his invention was directed. He did not claim he invented or discovered maintaining such a temperature therein, but claimed a combination of elements such as when used therein would render tap water defrosting practical and efficient. The operation to which

*Cf. App. p. 5, “McAdam’s Rebuttal of Examiner’s Rejection.”

he refers is one wherein the refrigerated space is constantly maintained at temperatures below the freezing point of water [cf. McAdam patent, p. 1, col. 1, line 16 to line 29, col. 2, p. 2; IV-1429].

York contends (p. 15) that to interpret the "refrigerated space" in accordance with the McAdam patent's particularization of the principle of the McAdam combination "is also untenable because in effect it turns apparatus claims into method claims." Even if this were true, this would not render the claims invalid. R.S.U.S. 4888 requires no distinction between claims for a method and claims for a machine:

"Claims which are functional in form; that is to say, claims which literally purport to cover a result rather than a process or a thing, are properly construed to cover only the process or the thing which produces that result, for otherwise such claims would be void. (Citing cases.) And a claim which literally purports to cover a process performed by machinery may under certain circumstances be properly construed to cover the machinery itself, and not any process performed thereby. (*Smith & Egge Mfg. Co. v. Bridgeport Chain Co.*, 46 Fed. 393, 395, C.C., Conn.)"

(Deller's Walker on Pats., Vol. II, §270, p. 1262.)

(cf. the claims in *Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 261 U.S. 45, and reference thereto at page 70 and in *General Electric Co. v. Saxe Sales Co.*, 82 F. 2d 100, CCA 6, App. p. 6.)

The McAdam Patent Is Not Anticipated by the Gayley Dry Blast Installations.

In our opening brief, pages 28-33, we have pointed out that the huge structures employed at various steel plants for drying the air prior to use in blast furnaces, and known as Gayley dry blast installations, do not anticipate the McAdam patent for the reasons: (1) that they were not self-draining; (2) the refrigeration units were not located in a space constantly maintained below the freezing point of water and (3) that the defrosting system involved the use of doors and vanes to isolate the refrigerating unit during the defrosting operation, the time interval being sufficient to insure that an elevated temperature was reached.

York Corporation takes issue with the assertion that, as found by the District Court [FF. 21, I-17], these units were not self-draining. Opposite page 18 of York's opening brief is a photographic reproduction of Plaintiff's Exhibit 1. Referring to this exhibit, it will be noted that a "water spray 2" pipe" at the upper part of the figure is colored red. Proceeding to the left there is an inclined pipe communicating with a round figure labeled "6" water header." Leading from this 6" water header is a yellow pipe. The Court will note that the bottom of this yellow-colored pipe is considerably above the bottom of the 6" water header, thus effectively assuring that the 6" water header could not possibly be drained. This in itself completely substantiates the finding of the Court and refutes York's position.

On page 26 of its brief York makes the erroneous statement that "Finding 21 relates only to Pittsburgh and Chicago." The apparent basis for this assertion is that

Finding 21 refers to depositions taken in Pittsburgh and Chicago. York's counsel failed to note that the depositions concerning Mayville were also taken at Chicago [II-504].

With respect to the South Chicago Gayley dry blast installation (particularly with respect to Exhibit 31), York argues (p. 27) that the water main passed through the top of each of the seven separate refrigerant chambers so that if No. 7 were being defrosted, the water would have to pass through the preceding six operating chambers. This is clearly contrary to fact. The water main was in a hallway outside of these chambers. Tominac testified that there was such a hallway running along the edge of this building, and that the valves on this water main were located in the hallway [II-513-514]. The valves, marked A in Exhibit 31, are between the water main and the coils. The drawing, Exhibit 31, is incorrect in not showing these valves in the hallway [II-513, 522]. This being true and the water main not passing through the successive compartments, York's argument that the problem faced by McAdams existed in this Gayley dry blast installation is clearly without foundation in fact.

The Gayley dry blast installations were not concerned with the problem of defrosting within a space constantly maintained below freezing. York's witnesses Tominac [II-532] and Mueller [II-615] establish that the brine used for refrigeration when it was pumped out of the coils was above freezing. If their refrigerating medium itself is above freezing, the space within which the refrigeration medium was used could not be below freezing.

In its statements of points to be relied upon on appeal [III-1109] York Corporation, of the patents

pleaded in the Answer, asserted only the U. S. patent Wenzl 2,097,851 and the French patent to Jensen & Roser No. 800,640. Despite this, in its brief plaintiff now relies upon the patent to Brassert No. 958,471 and the patent to Gayley No. 1,002,576. While we do not believe that these patents are properly before this Court, they can be disposed of here as they relate to these Gayley dry blast installations. Neither of these patents shows any system of draining the supply conduits and therefore clearly neither of them anticipates the McAdam combination. Neither of these patents makes any statement as to the temperatures maintained in the refrigerant chambers, especially during defrosting.

The patent to Brassert in fact substantiates our contention with respect to the temperature in the refrigerant chamber. On page 1, col. 2, lines 64-65 [IV-1259] the patent states:

“After a certain period of operation, snow or ice will collect *on the upper coils.*” (Emphasis ours.)

It is thus recognized that only the upper portion of the chamber is cold enough to produce frost. It is a well-known physical fact that frost will be produced whenever the temperature is reduced below the dew point; it is not necessary to reduce the temperature of the atmosphere to a freezing temperature in order to accomplish this. Thus the lower portion of the coils in these Gayley dry blast systems were not even below the dew point, let alone constantly maintained below the freezing point of water.

The McAdam Patent Is Not Anticipated by the Polar Ice Installation at Indianapolis.

In our opening brief we have pointed out, pages 34-38, that the purported installation at Polar Ice Co. was not proven to have ever been operated below freezing and was not self-draining but on the contrary was operated above freezing and used to store soft drinks, milk and the like. The unit was not capable of being operated below freezing as it was not self-draining and water stuck in the line [II-495]. The burden of proof rests upon York to conclusively establish the contrary.

Contrary to York's assertion (p. 33) that "There is nothing in the record to contradict" the testimony culled from the record to support its contentions, our opening brief, page 36, points out that the pipes as shown in Exhibit 18 are inclined the wrong way to be self-draining. York answers that they have sagged (York's brief, p. 35). However, its own witnesses have precluded any such contention. Barton and Martin both testified that there were no changes of any kind in the unit as installed and as shown in the photograph [II-418, 502].

York argues that this unit was guaranteed to hold a temperature of 30° F., but admits that this was not met as "first installed" (York's brief, p. 32).

The evidence of the witness Simons is unequivocal to the fact that from 1936, when he leased the premises, the temperature was 33° F. (Our opening brief, p. 35), and there was no change in the purpose for which the premises were used, which obviously did not require a below-freezing temperature (*id.* p. 35). This together with the "wet rot" of the walls (*id.* p. 36) is strong evidence in the record to contradict York's contentions.

It must be borne in mind that the burden rests upon York to establish "beyond a reasonable doubt" not only

the construction of this device but also all facts with reference to its manner of use. This burden does not rest upon Refrigeration, Inc. *Paraffine Companies, Inc. v. McEverlast, Inc.*, 84 F. 2d 335, 339, C.C.A. 9.

York also attacks the Finding No. 31 [I-19] that this unit was abandoned and discarded. We have shown that the attempt to patent this unit was abandoned (Our brief, p. 38); that an abandoned patent application is a nullity so far as anticipating a patented invention is concerned. There is not even a contention by York and no evidence in the record that from 1936 on this unit was a below-freezing installation. If a below-freezing operation was originally contemplated, it was discarded and abandoned. Clearly, then, as early as 1936 any suggestion of operating this unit within the conditions of the McAdam invention, *i. e.*, below freezing, was fully abandoned and discarded.

The most material proof in the letter of Goldsmith to Galt is his statement [IV-1144]

“* * * The Frick people, who have seen this device and have been engaged in the refrigerating business for almost a half a century, have intimated that *it is something radically new* and are surprised their own engineers have never seen it performed before or ever thought of it before, because it is so simple, but it does solve the problem first outlined,—prevention of ice blocks freezing together.” [Emphasis ours, IV-1144.]

Whatever the referred to device was, the Frick people (like the refrigeration experts on the advent of the McAdam invention), recognized it as “something radically new.” [cf. Finding 9, I-15, and our opening brief, pp. 23-4.]

The McAdam Patent Is Not Anticipated by the Swift & Co. Installation at Elmira.

We have pointed out in our opening brief that the pickle room and sausage room at Elmira were not below-freezing installations, were not self-draining and that Swift & Co. had a below-freezing room at Elmira using a totally different method of defrosting.

York argues that these units occasionally went below freezing over a week-end but there is absolutely no evidence that anyone ever attempted to defrost under such conditions, therefore there was no attempt "to introduce water into a space which was below the freezing point of water" as contended by York at pages 37-8 of its brief.

With respect to the inclination of the pipes, York contends that the reason they are not now pitched so as to be self-draining is because they have "sagged" (York's brief, p. 39). Such a contention is also made with respect to the Polar Ice installation. We believe that the present, observable condition is the best evidence of how these pipes were installed but even if it is true that the pipes have sagged, it conclusively proves that these installations do not involve the McAdam invention. McAdam's invention requires the supply and drain lines to be so pitched as to be self-draining. It would be inoperative without it, and it is not anticipated by a device which is apparently indifferent to the direction of pitch of the pipes.

On p. 39 of its brief, York states that the third room, the below-freezing room at Elmira, had bare pipe coils arranged about the walls of the room. This is a mere assertion by counsel for York *totally unsupported by anything in the record.*

The McAdam Patent Is Not Anticipated by the Yamhill Installation.

We have pointed out in our opening brief that the evidence with respect to this alleged Yamhill prior use insofar as it relates to the attempt to use water defrosting is hopelessly conflicting and confused. York in its brief relies principally on the witness Hulse's testimony (given in open court), even going so far as to print the drawing, Ex. Y-28, made by Hulse in 1946,—nine years since he had seen the installation (York's brief, p. 40).

This witness was specifically found to be unworthy of belief [Finding 47, I-22; cf. our opening brief, p. 46]. His drawing, Ex. Y-28, is contradicted by York's witness Trullinger who unqualifiedly stated that there was a door on the diffuser outlet which he closed during defrosting to keep the cold out (our opening brief, p. 46).

On p. 41 of its brief, York states what it claims was the method of operation of this installation but fails to note that there is also a conflict in the testimony here. York fails to mention the closing off of the diffuser from the locker room prior to defrosting to isolate it and keep the cold out (our opening brief, pp. 45-6). York also states that the water was shut off "when it had been observed that all of the frost had been removed," but note the testimony of Dahl that even when it appeared that the coil was free of ice, large blocks of heavy glazed ice would remain on the lower side of the coil [III-1077].

York argues in its brief, pp. 41-2 and 47-8, that this installation was perfectly satisfactory, ignoring the admissions of its witness Eustice that it was unsatisfactory [III-845, 850]; the statement of its witness Postlewaite that they couldn't make it work [III-894] and the testimony of Dahl referred to above.

On the point of the temperature of the isolated chamber containing the diffuser, York again relies (York's opening

brief, pp. 43-4) on the “not worthy of belief” testimony of Hulse and also depends on his testimony as to the public nature of the installation (*id.* 46). The turkey referred to (*id.* p. 42) clearly proves nothing. Does York claim that turkey was still frozen on its one-month trip from Yamhill to Amity [III-838]?

On p. 45 of its brief, York states that this unit was in use from November, 1936, to December, 1938, or January, 1939. We have pointed out in our opening brief that the evidence does not establish when the walls were built around the diffuser to isolate it (our opening brief, p. 44). Prior to the building of these walls the unit was admittedly unsatisfactory, as they couldn’t defrost it [III-782-3]. Thus York has not established a beginning date for this alleged prior use. Neither has the date been established when it was abandoned. York’s brief states that it was December, 1938, or January, 1939, but its witness Eustice states:

“Q. 113. When was that done? A. Well, I can’t recall, but it was in 1937 or the first part of 1938.”
[III-845.]

As pointed out in our opening brief, p. 44, the records to prove when this was done were available to York in the possession of its witness Trullinger, but were not produced. In such a case it is presumed that these records would be adverse to York’s contentions. California Code of Civil Procedure, Sec. 1963, subds. 5, 6.

All of the matters urged by York with respect to this alleged Yamhill prior use have been dealt with in our opening brief wherein it is pointed out that the evidence fully supports the detailed findings of the trial court. Clearly, York’s assertion that there is no evidence to support the findings is contrary to the record. These

findings are not “clearly erroneous” within the meaning of R.C.P. No. 52. Moreover, York’s heavy burden of proving a prior use “beyond a reasonable doubt” is not sustained by such a confused, contradictory and incomplete record.

York’s witness Postlewaite remained in the refrigerating business long after this alleged Yamhill installation. He testified:

“I knew that defrosting was a problem, a very serious problem” [III-898].

This refutes York’s claim in its brief, p. 59, that there was no problem for McAdam to solve.

Conclusion.

It is respectfully submitted that:

(1) That upon York’s appeal the judgment should be affirmed;

(2) Upon Refrigeration Engineering’s cross-appeal the judgment of invalidity of Claims 1-12, inclusive, and Claim 14 should be reversed and the District Court directed to enter judgment adjudging these claims valid and adjudging Claims 1, 2, 5, 6, 7, 8, 12 and 13 infringed by York;

(3) That the injunction of the judgment be extended to cover and embrace Claims 1, 2, 5, 6, 7, 8, 12 and 13 and the recovery of damages under each of these infringed claims.

Respectfully submitted,

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APPENDIX.

U. S. R. S. 4888:

“Before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application therefor, in writing, to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. The specification and claim shall be signed by the inventor. * * *

Patent Office Rule 71:

“The specification and drawing must be amended and revised when required, to correct inaccuracies of description or unnecessary prolixity, and to secure correspondence between the claim, the specification, and the drawing. But no change in the drawing may be made except by written permission of the office and after a photographic copy of the drawing as originally presented has been filed.”

Schriber-Schroth Opinion (311 U. S. 218-221):

“The Jardine patent was described as of the slipper type of piston although not limited to that type, the skirt consisting of two separated parts circumferentially separated from the piston head, supported by the webs which con-

nect the skirt or slippers with the piston head and support wrist pin bosses from which the skirt is retracted or cut away. The claims of the Jardine application as filed or later amended and ultimately allowed made no reference to the webs as flexible, yielding, or resilient, which the court of appeals found, when cooperating with other structural elements, to be a distinguishing feature of Jardine's invention. Claim 8 of the Jardine patent, which is typical of the three which the court below sustained, reads:

“‘In a piston for an internal combustion engine, the combination of a head having a cylindrical ring flange, oppositely disclosed webs integral with the flange and carrying diametrically opposite piston pin bosses, a skirt integral with said webs and cut away to expose the sides of said webs and separated from the ring flange by circumferential slits and provided with a longitudinal slit disposed between the ends of the webs.’”

“Claims 5 and 6 refer to the ‘skirt portion cut away from the head to expose the bosses.’”

“While the application was pending Jardine amended his claims so as to supply this omission. In various forms he claimed the piston head, skirt and web combination with piston head separated at its flange or periphery from the skirt, the skirt slotted or separated into parts and connected with the head by the webs variously described as ‘yielding ribs,’ ‘resilient arms,’ ‘skirt carriers . . . susceptible of being slightly flexed radially,’ or as ‘joining means being resiliently yieldable,’ or as ‘means for yieldingly connecting the said skirt section with said head.’ These claims, as a result of being thrown into interference with Hartog, No. 1,842,022, applied for February 16, 1920, allowed January 19, 1932, and in some instances with Gulick and with Long, No. 1,872,772, applied for

March 7, 1919, allowed August 23, 1932, were rejected by the patent office. Jardine then withdrew all of these amendments. Of these amended and cancelled claims, Claim 18 (19 E) is typical. It reads as follows:

“‘In a piston of the class described, a cuplike head comprising a pressure receiving end and a wall portion, a skirt, circumferentially disconnected from the wall portion of the head and divided from end to end, and skirt carriers connecting said skirt to the pressure receiving end, said skirt carriers being disconnected from the wall portion of the head and susceptible of being slightly flexed radially.’

“Upon comparison of the withdrawn claim with Claim 8 of the patent as allowed it will be observed that both are combination claims for a piston having a head, a divided or slotted skirt disconnected from the wall portion of the head and connected with the head by ribs, webs or skirt carriers. The only material difference in view of what has been said to be the invention is the statement in the withdrawn claims that the skirt carriers (webs) are ‘susceptible of being slightly flexed radially’ or the like. Whatever would have been the proper construction of the claims as allowed, read in the light of the specifications alone, there being no amendments, the question now presented is whether in view of the amendments and their withdrawal the patent can rightly be construed as including the flexible webs in the claim allowed.

“In addition to the fact of the cancellation of the only claims specifying flexing webs or their equivalents as a feature of the invention, it is to be noted that at no time during the prosecution of the Jardine application did he urge that he was the inventor of a piston having flexible

webs. Before the interferences and in distinguishing his invention from the Ricardo piston, Jardine urged as his only advance over Ricardo the addition of the slotted skirt which 'changes the structure and the resistance to a disposal of the forces within and without the piston when the piston is in use,' although in this litigation it is contended that the Ricardo patent did not disclose flexing webs. In submitting the final amendment cancelling the flexible web claims in interference and presenting the claims 8 and 11 of the Jardine patent held valid by the court below, there is no mention of flexing webs, the features stressed being in the case of Claim 8 that the webs are integral with the ring flange and in the case of Claim 11 that the webs are integral with the flange and extend 'convergently inwardly' therefrom.

"It is a rule of patent construction consistently observed that a claim in a patent as allowed must be read and interpreted with reference to claims that have been cancelled or rejected and the claims allowed cannot by construction be read to cover what was thus eliminated from the patent. (Citing cases.) The patentee may not, by resort to the doctrine of equivalents, give to an allowed claim a scope which it might have had without the amendments, the cancellation of which amounts to a disclaimer. (Citing cases.) The injurious consequences to the public and to inventors and patent applicants if patentees were thus permitted to revive cancelled or rejected claims and restore them to their patents are manifest. See *Leggett v. Avery*, 101 U. S. 256, 259, 25 L. ed. 865, 866.

"True, the rule is most frequently invoked when the original and cancelled claim is broader than that allowed, but the rule and the reason for it are the same if the cancelled or rejected claim be narrower. (Citing cases.)"

McAdam's Rebuttal of Examiner's Rejection [IV-1353-55]:

"It is submitted that all of the claims call for a space which is *constantly maintained* below the freezing point of water, even during the defrosting period, and that this invention is unique in providing that such a space can be maintained BELOW the freezing point of water at all times while the coil which does this work is being momentarily raised above that temperature and is completely defrosted by a medium which would freeze instantly it left the confines of the coil and which would remain frozen, and which water would freeze in any undrained conduit such as shown by Kagi or the other references.

Applicant is engineer for Refrigeration Engineering Incorporated, of Los Angeles, California, for whom this invention was developed. This invention was developed as a result of repeated demands by the trade for a simple and efficient defrosting method for low temperature boxes and freezing rooms where products MUST BE CONSTANTLY maintained below freezing and where the air of the compartment must never rise above freezing, and where any water allowed to remain for more than a few seconds will congeal and remain frozen, and where any form of drip will continually build up as ice on the floor or walls, and where the device of Kagi or the other devices of record are totally inoperative with water.

This invention has attained immediate commercial success and engineers and others experienced in low temperature refrigeration concede that its success is due to the novel combination of low-specific-heat conduits, immediate automatic self-draining of the water supply means, and to the combination of a fan and coil so co-ordinated that air flow is substantially discontinued when the fan is dis-

continued and the warming effect of the water is thereby confined to the coil surfaces.

In the device of Kagi air would continue to flow by the usual method over the coils during defrosting just as it does when no defrosting is carried out, and this air would be so greatly humidified and warmed as to be highly impractical by heating the air of the room and by redepositing the resultant vapors on the stored products either as dew or frost. Extremely low dew points exist in rooms maintained constantly below freezing point and liberation of moisture laden air is even worse than liberation of free water.

In Kagi as in all other devices cited, exposed conduits, and undrained spaces are provided in which residual water would freeze.

It is submitted that practically every person devoid of technical training is aware of the fact that a water pipe, such as the usual domestic water system pipe, cannot be thawed out by ground water bearing against the plug of ice. The conduits of applicant, once containing a dam of ice would render the entire system inoperative and yet it can be shown that all of the many installations made by applicant and his associates remain constantly operative over indefinite periods where the temperature of the box or compartment never rises above Zero degrees Farenheit (32 degrees below the freezing point of water)."

General Electric Co. v. Saxe Sales Co., 82 F. (2d) 100 103, 104 (C. C. A. 6):

"The claim of estoppel made by the defendants and based upon the Patent Office history of the Pipkin patent, though persuasive below, is somewhat difficult to comprehend. It is true that a number of process claims were

rejected in the Patent Office over Wood, but Wood was cited as anticipating all of the claims of the patent. The inventor conceiving himself sufficiently protected in his invention by the claims allowed, thereafter and not until then abandoned others. The appellant, his assignee, seeks to recover no lost ground. The court thought that 'the Patent Office history of the Pipkin patent so far impairs its patentability over Wood as to give adequate force to the challenge of validity and to overcome the weight of the presumption of validity of the patent.' The very converse of this proposition is the law, for it has long been settled that where references in the record were before the Patent Office and were rejected as anticipations the presumption of novelty and invention which arises from the grant of the patent is greatly strengthened. *Gairing Tool Co. v. Eclipse Interchangeable Counterbore Co.*, 48 F. (2d) 73, 75 (C. C. A. 6); *Gordon Form Lathe Co. v. Walcott Machine Co.*, 32 F. (2d) 55 (C. C. A. 6); *Hildreth v. Mastoras*, 257 U. S. 27, 32, 42 S. Ct. 20, 66 L. Ed. 112. It must be noted that there is here no question of extent or scope of the claims. They are very precisely defined; in fact too precisely defined in the opinion of the court below. The principle that 'where an applicant for a patent is compelled by a rejection of his application to narrow his claims, he cannot after the issue of the patent broaden them,' as set forth in *Smith v. Magic City Kennel Club*, 282 U. S. 784, 51 S. Ct. 291, 293, 75 L. Ed. 707, or as it was somewhat differently expressed by us in *D'Arcy Spring Co. v. Marshall Ventilated Mattress Co.*, 259 F. 236, 240, cannot be here applied, because the plaintiff seeks no broader interpretation of its patent claims than their language clearly imports. There was no estoppel."

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 11642

REFRIGERATION ENGINEERING, INC., a Corporation,
Appellant,
vs.

YORK CORPORATION, a Corporation,
Appellee,
and

YORK CORPORATION, a Corporation,
Appellant,
vs.

REFRIGERATION ENGINEERING, INC., a Corporation,
Appellee.

REPLY BRIEF ON BEHALF OF YORK CORPORATION

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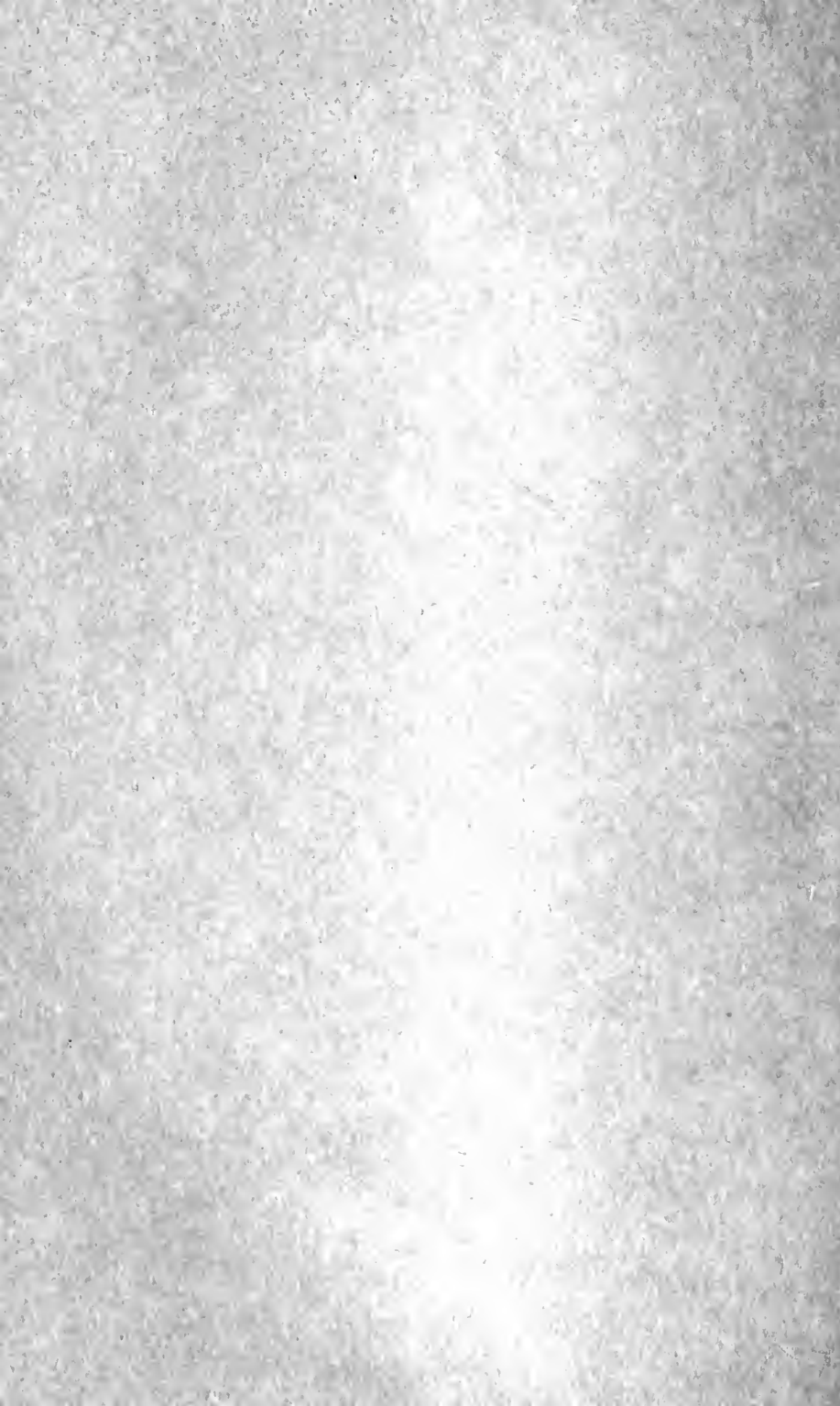


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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

REFRIGERATION ENGINEERING, INC., a
Corporation,

Appellant,

vs.

YORK CORPORATION, a Corporation,
Appellee,

and

YORK CORPORATION, a Corporation,
Appellant,

vs.

REFRIGERATION ENGINEERING, INC., a
Corporation,

Appellee.

No. 11642

Reply Brief on Behalf of York Corporation

In its main brief Refrigeration states, and we agree, that the McAdam claims are for a combination, one of the elements of which is "a refrigerated space". But Refrigeration insists that this term must be "construed as limited to a refrigerated space constantly maintained below the freezing point of water" (Br. p. 60). This construction is referred to throughout the brief, when considering the McAdam alleged invention (pp. 2, 60), or in distinguishing the prior art (pp. 29, 35, 38, 45, 47, 50).

The refrigerated space is an important part of the combination, for Refrigeration attempts to distinguish the

claims over the prior art upon the ground that in McAdam the refrigerated space is “constantly maintained below freezing.”

Even if that limitation be read into the claims,

1. York has not infringed, because it has not made, used or sold any refrigerated space, whether or not “constantly maintained” below freezing, and there is no proof of any such manufacture, use or sale (York Br. pp. 67-8); and

2. The patent is invalid for lack of invention (York Br. pp. 56-67); and

3. The patent is anticipated by prior uses, a prior sale and prior patents conforming exactly to this interpretation (York Br. pp. 16-53).

But it is York’s contention (Br. pp. 13 to 15) that the McAdam patent was not issued for any such invention as is now claimed by Refrigeration, because

(a) the Patent Office specifically refused to allow claims which incorporated the limitation Refrigeration now asserts, and McAdam acquiesced in the deletion of this limitation; and

(b) the proposed limited construction of the claims in effect turns these apparatus claims into method of use claims, since “constantly maintaining” below freezing is a function of operation and not a physical thing. Since McAdam asked for method claims, but cancelled them during the prosecution of the application, there was an abandonment of such claims which cannot now be recaptured.

Since such a limitation can not be read into the claims, there is no basis for claiming that McAdam differs from the prior uses on this ground. Each of the installations has all the physical elements specified in the McAdam claims.

In the comments which follow upon Refrigeration’s Main Brief we have used its system of paragraph numbering.

1. The McAdam Patent Does Not Involve Invention

Since York's Main Brief (pp. 56-67) completely meets Refrigeration's argument (pp. 15-27) on the question of invention, we will here merely comment briefly upon some of the evidence Refrigeration erroneously contends supports its position.

Refrigeration contends that the brine method of defrosting was the closest approach to the McAdam invention; that the horrible example of brine defrosting at the Haslett Warehouse shows the great superiority of water defrosting, and therefore, presumably, that invention resides in McAdam's patent (pp. 15-6).

The argument is unsound first because the single example of the use of brine relied upon by Refrigeration was not used with a comparable type installation. The Haslett installation was of the exposed bare pipe type (R. 177) whereas McAdam's device is to be used with the enclosed coil unit type. A comparison of the two is meaningless. A much fairer comparison would be between McAdam's device and the typical brine defrosting system used successfully with the enclosed coil unit sold for years by York and still sold by it (R. 1016-7).

Moreover, the attempt to defrost at the Haslett Warehouse was far from the usual or typical brine defrosting operation. The great mass of exposed bare pipe at Haslett had never previously been completely defrosted, and was therefore so completely covered over with ice that there was very little space between the pipes (R. 178, 179). Even Refrigeration's manager testified "it is very bad practice" to let ice accumulate on the coils (R. 97). Obviously under such conditions when an attempt was made to defrost with brine, the operation was expensive and took a long time. As this was the only experience which the Haslett operator, Payne, had had with brine defrosting (R. 179), he was not familiar with the compact, enclosed, refrigerating units sold by York and others for many years prior to McAdam, which were equipped with continuous or intermittent brine defrosting. These are

shown in the drawings, Pl. Exs. 108-10 (R. 1313-5) and Exhibit C attached to the stipulation Def. Ex. CC (R. 1535). Such units defrosted in two to five minutes (R. 1017).

There is no question that brine was an accepted method of defrosting. Refrigeration's witness Ruppright suggests brine defrosting in his article (Def. Ex. Z, R. 1512). Counsel for York offered to show the Court a continuous brine spray unit in Los Angeles, but the offer was refused (R. 233). The fact that no intermittent brine spray units were available in Los Angeles attests to nothing, except perhaps that continuous brine spray was more popular in Los Angeles than was intermittent brine spray.

But, secondly, the argument is wholly fallacious because the closest approach in the prior art to McAdam was not brine, but water defrosting. There can be absolutely no question that it existed. It was disclosed in the prior patents and it was used in the prior uses proved in this case. Refrigeration's main contention seems to be that it was not used in a refrigerated space "constantly maintained" below freezing. As we have pointed out, this is not the fact and, even if it were, it would make no difference for the patent claims can not be limited in this respect.

Ia. "Long Felt Want."

That there was no "long felt want" is shown in York Main Brief, pp. 59-60.

The articles referred to by Refrigeration (pp. 19-23) do not support its position.

(a) *The Consley Article* (R. 1509):

This article relates to various methods of defrosting coils of the *exposed bare pipe* type arranged around the wall or ceiling of the refrigerated space. The fact that water defrosting is mentioned by Consley shows that such defrosting was not new. But that he thought this method had objections for defrosting *exposed bare pipe* is completely without significance to this case and is certainly not surprising, for in the nature of things water defrosting was then and is now utterly unsuitable for installations having exposed bare pipe on walls or ceilings. There is

no evidence that water defrosting is ever used today for such installations. The objections Consley made to water defrosting would not apply to defrosting concentrated enclosed coils.

Far from proving that there was no satisfactory means of defrosting and therefore there was a "long felt want", this Consley article shows that the hot gas method of defrosting was a common and satisfactory one (R. 1510-1511) which it still remains today (R. 1020).

(b) *The Ruppright Article* (R. 1512):

This article not only does not prove a "long felt want", but describes numerous successful methods of defrosting (R. 1513-6, par. 10-20) many of which are used today more commonly than water defrosting (R. 1020, 1031-2). The author lays particular emphasis on gas defrosting which he states "is very efficacious" (R. 1514, par. 17). His comment that water defrosting could be used "were it not for the trouble caused by water freezing in the piping during regular operation" (R. 1512) can carry little weight, for he admitted on cross-examination that he had never tried defrosting "where there was a spray head over the coils," (R. 144) nor did he have any knowledge of the use of water defrosting in the Gayley plants or at Yamhill or Indianapolis (R. 143-4). He also was apparently not familiar with the common plumbing practice of draining standing water from pipes in a freezing zone, nor with the ordinary valve means for doing this.

It is significant that although Ruppright was called as a witness by Refrigeration, he did not testify that there was any "problem of satisfactorily defrosting" as claimed by Refrigeration.

(c) *The York Manual* (R. 1498):

The statement contained in this manual that when using gas defrosting "the drain line must be omitted as it would be frozen shut", proves nothing as to York's views of the practicability of water defrosting. The manual was not talking about water defrosting. Obviously in gas defrost-

ing there would be no large or sudden flow of water as in water defrosting to sweep the ice and frost away through a drain before it has a chance to clog the drain. The statement in this manual undoubtedly applies as well today to gas defrosting as when it was made. This manual proves nothing with respect to a "long felt want" for water defrosting or for a satisfactory defrosting method. All it indicates is the proper equipment for gas defrosting.

Ib. Scepticism of Unqualified Witnesses.

Refrigeration refers to scepticism on the part of "the refrigeration industry" and initial doubt of "qualified refrigeration experts" (pp. 23-24). As discussed on pages 62 to 66 of our Main Brief, Refrigeration's attempt to introduce hearsay testimony and the testimony of a few unqualified witnesses as to their "surprise" at water defrosting, is not proof as to the attitude of the "industry" and in no way supports the inventive character of the McAdam claims.

The matter of the guarantees which were given to a few early purchasers is considered in York's brief at p. 65.

Ic. Refrigeration's Sales Do Not Support the Claim of Invention.

Refrigeration's arguments on this point (pp. 25-27) are completely answered on pages 66 and 67 of York's brief.

II. The Patent Was Anticipated.

Ila. By Prior Use of Gayley Dry Blast Installations.

Refrigeration attacks the Gayley dry blast systems on the grounds that

(a) they were not self-draining, and

(b) that the coils were not located in a space "constantly maintained" below the freezing point of water (pp. 28-33). As to these points, the evidence clearly establishes the contrary (York pp. 25-28), but the significant thing is

that even Refrigeration *does not deny the existence and operation of these three water defrosting installations*, which between them operated from 1906 to 1928.

(a) Every one of the witnesses who was connected with the operation of the Gayley dry blast systems testified that they were self-draining (Brandt R. 335, 344; Kennedy R. 365-6; Harkins R. 389; Gaide R. 565-7; Tominac R. 510; Mueller R. 580, 595). Refrigeration attempts to throw doubt on this uncontradicted evidence by reference to the drawings of these systems which show the spray pipes to be substantially horizontal. Obviously drawings on such a small scale as these would not show any slight inclination which might be required for drainage, as pointed out by the witness Kennedy (R. 376): "When they put a pipe in like that, they put it on a little elevation. Probably on a drawing like that, they would not show it". Moreover, as explained on pages 19, 22 and 26 of York's Main Brief, these systems would have drained whether the spray pipes were horizontal or not.

(b) Refrigeration contends that the Gayley installations do not anticipate because they "were not located in a space constantly maintained below the freezing point of water" and that McAdam's invention is not anticipated unless the space is "maintained *constantly* below the freezing point of water" (p. 29; emphasis theirs).

The proof is clear and uncontradicted that during operation of the Gayley installations the refrigerating chambers were below freezing (York Br. p. 25). It is inevitable that this condition continued during at least a portion of the defrosting period because the warm outside air was excluded from the single chamber being defrosted and the accumulated mass of ice and frost would continue to cool the space (York Br. p. 26). It is immaterial whether such a condition existed the entire time of defrosting, any more than it does within the refrigerating unit of McAdam (R. 180-1). If the water was exposed to freezing temperatures for any substantial time the "problem" existed as much as if the freezing temperature were "constantly

maintained.” However, in the Gayley installations the water pipes passed through chambers which were in operation, to reach the chamber being defrosted. The pipes passing through these operating chambers were subjected to “constantly maintained” freezing temperatures. The “problem” of standing water freezing in these pipes existed in the Gayley installations in exactly the same way as in McAdam and was solved in the same way (York Br. pp. 27-28).

IIb. By Sale to Polar Ice Company at Indianapolis.

The defense here proven is not prior use but prior *sale* by Hayes Bros. Inc. to Polar Ice, of an installation which had all of the elements of McAdam’s claims and which was designed to operate and did operate at the time of sale in a space “*constantly maintained*” below freezing (York Br. pp. 28-36).

Refrigeration’s brief does not refer to any oral or documentary evidence which throws the slightest doubt upon the above, or upon the fact that the sale was made, or that the structure of the installation sold was as described by York in its brief, or that the unit was designed to operate and was operated by those who installed it to maintain constantly a below freezing temperature.

Refrigeration’s criticisms are directed to the condition of the installation, and to how the equipment was used, at a time *long after its installation* and shortly before the trial of this case. Obviously this has nothing to do with the situation at the time of sale. The conditions *at that time* are the only ones pertinent and as to those conditions there is no conflict of evidence.

Lacking refuting evidence, Refrigeration has attempted to confuse the issue by referring to Barton’s testimony that the installation was indelibly imprinted on his mind, because it was “such a headache and a source of so much trouble” (R. 418). The testimony conveniently omitted by Refrigeration was Mr. Barton’s statement that the “headaches” to which he was referring were the troubles en-

countered *before water defrosting was put in*. He testified (R. 429):

“203 Q. Was the job straightened out? A. Yes, sir.

204 Q. Were there any headaches or troubles thereafter? A. No sir. [547]

205 Q. How was it straightened out? A. It was straightened out by installing this water defrosting system to take the frost and ice off the coil.

206 Q. Did you have any complaints with respect to the operation of this unit during the period of inspection which you made after the installation was complete and paid for? A. No sir.”

Similarly, when Barton was quoted as stating that he “could not be conclusive as to maintaining below freezing conditions in the room” (Br. p. 36), Refrigeration’s brief failed to point out that Barton was not talking of the situation at the time of installation and sale but as of when the photographs (Pl. Exs. 18 and 19) were taken, shortly before the trial. With the deterioration that had taken place in the building since 1934, Barton naturally refused to give an opinion, since, as he stated, he did not know the present condition of the building with respect to moisture and insulation (R. 431).

Refrigeration states that the unit “was not self-draining” (Br. p. 36), but the only evidence cited to support this is based upon the condition of the unit at the time the depositions in this case were taken, years after installation, the unit in the intervening years having sagged, naturally shifting the inclination of the piping (R. 495). This has nothing to do with its condition at the time of installation and sale. The *only* evidence of its condition at that time is testimony that the piping was installed in such a manner that it would and did drain (Barton R. 411; Hayes R. 445, 464).

As to Simons stating that the water stuck in the line, Refrigeration did not point out that he also said that this was “before I learned how to defrost it right” (R. 491) and “before I learned how to operate the machine” (R. 495). But again, that has nothing to do with the condition at the time of sale.

Documentary evidence and corroborated testimony establish that this water defrosted unit, having the structure of the McAdam claims, was sold prior to his date of alleged invention and at the time of sale it was capable of maintaining and did maintain constantly a temperature below freezing. This constitutes a complete anticipation, even accepting Refrigeration's interpretation of the claims.

IIc. By the Prior Use of Swift & Company Installations at Elmira.

This prior use is completely covered in York's Main Brief pages 36 to 39.

The fact that the pickle room spray pipe once froze does not disprove that the installation was self-draining but only indicates that the installation may have once been improperly operated. The McAdam patent is for an *apparatus* and not a mode of operation. Both apparatus at Swift & Company have all of the physical elements of the McAdam apparatus and, as such, fully anticipate the patent.

IId. By the Prior Use at Yamhill.

Refrigeration argues (pages 41-50) that this prior use should not anticipate the patent because

(a) it was an unsatisfactory experiment and was abandoned;

(b) "it was not constantly maintained below the freezing point of water, and, hence, did not involve the McAdam invention" (p. 47); and

(c) involved "walls and vanes isolating the refrigerating unit, a defect which it is one of the objects of the McAdam invention to avoid" (p. 47).

This prior use is discussed at pages 39 to 49 of York's Main Brief.

(a) The evidence establishing that the installation was satisfactory and was not an abandoned experiment, is summarized on pages 45-49 of York's Main Brief and need not

be repeated here. It should be stated, however, that it is not a fact that none of those associated with the Yamhill installation ever intended to build another unit like it (Refrigeration Br. p. 45), for Postlewaite stated that he installed another water defrosting system at Glacier Bay Oyster Company at North Bend, Washington, and that the Yamhill unit was not the first one installed (R. 914).

(b) Again Refrigeration emphasizes that McAdam's invention involves "constantly maintaining" the refrigerated space below freezing. As we have pointed out in our Main Brief, McAdam's patent is not so limited (pp. 13-15) and if so limited, is not infringed by York (p. 68).

However, in the Yamhill installation the evidence is absolutely uncontradicted that the locker room was maintained at a below freezing temperature, and that the "little room" next to the locker room, in which the refrigerating unit was placed, was below freezing (York Br. pp. 43-45).

Postlewaite did not testify, as Refrigeration implies at page 45, that the "little room" was above freezing during defrosting. What he was asked was whether the temperature *inside of the refrigeration unit* was raised to the temperature of the water during defrosting and he replied (R. 891) "Well, no, I don't think so. It might have. I couldn't tell you that for sure." Obviously the temperature inside of the unit would have been raised slightly by the water defrosting, just as it was raised in Refrigeration's unit, as Refrigeration's own witness testified (R. 180-1).

(c) If Refrigeration contends that an installation which has the refrigerating unit outside of the insulated space but connected to it with ducts, for that reason is not an anticipation of the patent, then such a device cannot constitute an infringement of the patent. The claims do not require the refrigerating unit to be inside the refrigerated space but merely specify that it shall be "in combination with a refrigerated space". However, in the Yamhill installation the refrigerating unit, while outside of the locker room, is within the "little room" which was below freezing.

Whether there were doors or vanes in the air duct leading into the locker room and whether they were placed there to keep the defrosting water from splashing into the locker room as was testified (R. 936), is a matter of no consequence. The important consideration is that the Yamhill installation had each element of the apparatus specified in the McAdam claims in suit, irrespective of what other additional improvements it might have had.

Ile. The Wenzl and the Jensen & Roser Patents Anticipate.

Refrigeration's objection (pp. 50-55) to these patents is that neither teaches the use of water for defrosting "refrigerator coils located in a space required to be *constantly maintained* below" freezing.

Refrigeration's objection again emphasizes that it is attempting to import into apparatus claims a method of use, or function. Although it is stated specifically in the Wenzl patent that "the air is cooled to a temperature below 0° " (R. 1275, col. 1, lines 33-4) and in the Jensen & Roser patent that the temperature of the air leaving the refrigerating machine is not higher than -2° C. (28° F.) (R. 1282), Refrigeration argues that in order to anticipate, the patents must teach that the space is required to be "constantly maintained" below freezing. It is obviously ridiculous to contend that the prior devices must have been actually "constantly maintained" at a specific temperature in order to be anticipations. This imports a question of how the particular apparatus was operated. It is certainly enough if the apparatus has all the elements conforming to the physical elements required by the McAdam claims and is capable of operating in a temperature which is below freezing. Such a device is anticipatory whether or not the refrigerated space was actually "constantly maintained" below freezing.

The *Wenzl* patent clearly teaches the idea of using water from a spray pipe to defrost coils which are used to cool the air of a refrigerated space "to a temperature below 0° " (R. 1275). The patentee Wenzl did not consider it necessary to show the pipe connections to his spray head

or from his drain pan, since it was obvious that by using common plumbing practice (R. 430, 464) the pipes could be drained when the spray head was not in operation.

In the *Jensen & Roser* patent (R. 1279, 1286) the construction of the device is such that it obviously is intended to be placed within a refrigerated space the air of which is cooled to a temperature at least as cold as 4° F. below freezing. The whole defrosting operation was intended to take place in a sub-freezing atmosphere. The construction is entirely clear, despite the difficulties which Refrigeration tries to find with it. The spray head 16 placed above the container tube is stated to be “pierced with openings to permit the air or water to flow uniformly through the container *and its pipes and into its passages*” (R. 1282). Therefore, obviously the spray head 16 is pierced on the inner surface as well as underneath, so that water will be sprayed over the top of the container and through the pipes and passages which extend longitudinally through the container, as well as spraying over the outside of the container.

This French patent shows a device specifically adapted to be placed within a refrigerated space which is to be cooled to a temperature below freezing; the device is intended to be supplied with water which is brought into, sprayed in, and taken away through, a freezing atmosphere. The patent discloses an apparatus similar to McAdam: an inlet pipe leading to the spray pipe above the cooling unit for spraying water over the unit to melt the ice, a drip pan 14 and a discharge pipe 18. The only parts which it does not show are the usual plumbing connections outside of the refrigerated space to the water source. Inclining the piping so that it would drain and providing the usual valves for letting the water in and out, which is all that McAdam added to the structure of either of these patents, are certainly not within the realm of invention.

Refrigeration makes the statement (Br. pp. 23-24) that it was not obvious to use water in a space which was at a temperature “below the freezing point of water in the hope

of removing frozen water. There is indeed an element of daring in the suggestion". As stated above, both the Wenzl and Jensen & Roser patents specifically state that the air leaving the refrigerating coils, and therefore the coils themselves, are at a temperature below freezing. There is nothing novel, therefore, about the use of water to defrost at below freezing temperatures. These patentees found nothing "daring" in the suggestion, nor did the numerous witnesses who testified as to the prior uses.

McAdam was not the first to discover that water contained enough heat to melt ice which was in an atmosphere below freezing. Nor could he have obtained a patent for this had he been the first to discover it, for it is merely a function of nature. *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, — U. S. —, 76 U. S. P. Q. 280 (decided February 16, 1948). Nor was such a patent granted him. He was granted a patent for a specific apparatus, a combination of *physical* elements. Any prior art device having those physical elements anticipates his patent.

III. McAdam Patent Is for a Combination

There is certainly no doubt that the McAdam patent is for a combination. What Refrigeration does not make clear (p. 55) is that the claims of the patent are for a combination of *physical things* constituting a physical apparatus. One of those physical things is a refrigerated space. Whether that refrigerated space be "*constantly*" maintained at below freezing is not a part of a physical apparatus combination. It may be a method of operation, but is certainly not part of an apparatus, which is the kind of patent McAdam was granted. And the Patent Office specifically refused the inclusion of such an element in apparatus claims, to which refusal Refrigeration acquiesced (York Br., pp. 13-15). Refrigeration can not now claim that such a limitation is a part of the claims.

IV. York Does Not Infringe

Refrigeration has now categorically stated that the McAdam "claims are to be construed as limited to a refrigerated space constantly maintained below the freezing point of water" (Br. p. 60).

In order to prove infringement, it is necessary that Refrigeration prove that York made, used or sold not only the water defrosted unit defined in the claims, but also a "*refrigerated space*", and additionally that the refrigerated space was "*constantly*" maintained below freezing. Refrigeration specifically states that the claims are thus limited (Br. p. 60).

There is no proof that York has made, used or sold *any* refrigerated space, and no proof that any refrigerated space was maintained "*constantly*" below freezing.

The stipulation as to York's sales states that York "supplied water defrosting connections with its standard sectional coil unit, where the unit was installed to maintain a temperature well below freezing in the refrigerated space" (R. 1528). What York sold was the unit and connections, and *not* the space. There is no statement in the stipulation that the refrigerated space was made or sold by York. What York sold was something *less* than the patented combination, since it did not sell the refrigerated space which was an element of the combination, and an important one, for it is only by its limited interpretation of the term "*refrigerated space*" that Refrigeration claims to be able to distinguish the prior art. Having made and sold something *less* than the patented combination, York can not possibly have infringed.

Refrigeration's remarks on infringement (p. 57) would be somewhat more pertinent if the question were one of York's "*contributory* infringement". But that is not the issue here. The issue and charge is one of *direct* infringement and York has not directly infringed.

Refrigeration asserts its patent is for a combination including a refrigerated space constantly maintained below freezing. It seeks to distinguish all the prior art on that limited element. Clearly, therefore, Refrigeration must prove that York made, used or sold the combination including that element which is the asserted difference over the prior art. York did not in fact do so, and there is no proof in this case that it did.

York has not infringed any of the claims.

V. All the Claims in Suit Are Invalid.

Although Refrigeration does not now charge infringement of claims 3, 4, 9-11, 14 (Br. p. 57), the validity of all the claims of the patent is in issue.

The District Court was correct in its holding that claims 1 through 12 and 14 are invalid, but it should have also held invalid claim 13. They are all invalidated by the prior patents, prior sale and prior uses already discussed.

VI. Refrigeration Has Misused the Patent.

There is no doubt that Refrigeration has misused this patent (York Br. pp. 69-74). Refrigeration admits (p. 61) that it does not sell a hose or connections which form a portion of the supply and drain conduits. Its Manager, Jarvis, testified that what Refrigeration sold was "The complete package as you see it (referring to Defendant's physical exhibit GG) with the 3-way valve, fan, motor, housing, spray pan over the top and spray pan underneath" (R. 1099). There is no mention here of a refrigerated space. To sell less than the whole patented combination is to sell an unpatented product because "a patent on a combination is a patent on the assembled or functioning whole, not on the separate parts." *Mercoind Corp. v. Honeywell Co.*, 320 U. S. 680, 684 (1944).

There is therefore evidence before the Court that Refrigeration is conducting its business in a manner which was condemned in the *Mercoild* cases, 320 U. S. 661 (1944), and 320 U. S. 680 (1944).

Respectfully submitted,

February, 1948.

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United States
Circuit Court of Appeals
For the Ninth Circuit

BLOOMFIELD RANCH, by JAMES A. CLAYTON & CO., a corporation, managing partner, operator and co-owner thereof, and by FLORENCE G. BALDWIN, JOHN DERROL CHACE, WILLIS SHERMAN CLAYTON, JR., ARTHUR D. CURTNER, JOHN KIRK DORRENCE, ROSE L. FITCH, MARGARET F. COYKENDALL, HUGH S. HERSMAN, ALFRED A. HAPGOOD, GEORGE H. OSEN, ALFRED L. PARKINSON, Estate of Andrew R. Patrick, deceased, by SIGURD C. P. CORNETT, as executor of the will of Andrew R. Patrick, deceased, SAN JOSE HARDWARE CO., a corporation, NELLIE SHILLINGSBURG, ANNE THOMPSON, SARAH SHILLINGSBURG BARRY, MARGARET LEAMAN, and Estate of Ellen Weinstein, deceased, by Wells Fargo Bank & Union Trust Co., Executor, substituted for Estate of Samuel Weinstein, deceased, by Ellen Weinstein, as executrix of the will of Samuel Weinstein, deceased, partners in and co-owners of Bloomfield Ranch,

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vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

PAUL P. O'BRIEN

United States Circuit Court of Appeals For the Ninth Circuit

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

O. K. CUSHING,
EUSTACE CULLINAN,
DELGER TROWBRIDGE.

For Commissioner:

LEONARD A. MARCUSSEN.

In The Tax Court of the United States

Docket No. 5007

BLOOMFIELD RANCH, by JAMES A. CLAYTON & CO., a corporation, managing partner, operator, and co-owner thereof, and by FLORENCE G. BALDWIN, JOHN DERROL CHACE, WILLIS SHERMAN CLAYTON, JR., ARTHUR D. CURTNER, JOHN KIRK DORRANCE, ROSE L. FITCH, MARGARET F. COYKENDALL, HUGH S. HERSMAN, ALFRED A. HAPGOOD, GEORGE H. OSEN, ALFRED L. PARKINSON, ESTATE OF ANDREW R. PATRICK, deceased, by SIGURD C. P. CORNETT, as executor of the will of Andrew R. Patrick, deceased, SAN JOSE HARDWARE CO., a corporation, NELLIE SHILLINGSBURG, ANNE THOMPSON, SARAH SHILLINGSBURG BARRY, MARGARET LEAMAN, and ESTATE OF SAMUEL WEINSTEIN, deceased, by ELLEN WEINSTEIN, as executrix of the will of Samuel Weinstein, deceased, Partners in and co-owners of Bloomfield Ranch,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

See Order of 3/31/47—That the Estate of Ellen Weinstein, deceased, Wells Fargo Bank & Union Trust Co., Executor, be substituted in the place and stead of the Estate of Samuel Weinstein, deceased, by Ellen Weinstein, Executrix.

DOCKET ENTRIES

1944

- May 22—Petition received and filed. Taxpayer notified. Fee paid.
- May 23—Copy of petition served on General Counsel.
- May 22—Request for Circuit hearing in San Francisco filed by taxpayer. 5/29/44 Granted.
- June 30—Answer filed by General Counsel.
- July 4—Copy of answer served on taxpayer, San Francisco, California.

1945

- Feb. 10—Hearing set Apr. 23, 1945, San Francisco.
- Mar. 21—Hearing date changed to 7/9/45, San Francisco, Cal.
- July 10—Hearing had before Judge Harron on merits. Stipulation of facts filed at hearing. Briefs due 8/24/45; replies 9/8/45.
- Aug. 7—Transcript of hearing 7/10/45 filed.
- Aug. 20—Brief filed by taxpayer.
- Aug. 20—Findings of fact proposed by taxpayers filed.

1945

Aug. 21—Motion for extension to Sept. 24, 1945, to file brief filed by General Counsel. 8/22/45
Granted.

Sept. 24—Brief filed by General Counsel. Copy served 9/25/45.

Oct. 3—Motion for extension to 10/30/45 to file reply brief filed by taxpayer. 10/4/45
Granted.

Sept. 25—Copy of brief and proposed findings of fact served on General Counsel.

Oct. 29—Reply brief filed by taxpayer. 10/29/45
Copy served.

Oct. 31—Reply brief filed by General Counsel. Served 11/1/45.

1947

Jan. 31—Memorandum findings of fact and opinion rendered, Judge Harron. Decision will be entered for respondent. Served 2/3/47.

Jan. 31—Decision entered, Judge Harron, Div. 13.

Mar. 31—Stipulation to change the caption filed.

Mar. 31—Appearance by O. K. Cushing, Eustace Cullinan and Delger Trowbridge as counsel, filed, that Wells Fargo Bank & Union Trust Company, as Executor of the Will of Ellen Weinstein, deceased, appears as a party petitioner in this cause.

1945

Mar. 31—Order that the Estate of Ellen Weinstein, deceased, Wells Fargo Bank and Union Trust Company, Executor be substituted as the party petitioner in the above proceedings in the place and stead of the Estate of Samuel Weinstein, deceased, by Ellen Weinstein, Executrix, entered.

Apr. 21—Bond in the sum of \$21,650.00 approved and ordered filed.

Apr. 21—Petition for review by U. S. Circuit Court of Appeals for the Ninth Circuit filed by taxpayer.

Apr. 21—Proof of service of a copy of the petition for review filed.

Apr. 28—Designation of record filed by taxpayers.

May 5—Proof of service of designation of record filed.

May 7—Certified copy of a motion with order thereon from the Ninth Circuit directing Clerk of the Tax Court to transmit to the Circuit Court Petitioner's original exhibits 11 and 14 and Respondent's Exhibit E, fifteen days prior to argument on this case filed. [2*]

* Page numbering appearing at top of page of original certified Transcript.

[Title of Tax Court and Cause.]

PETITION

The above-named Bloomfield Ranch hereby petitions, by James A. Clayton & Co., a corporation, managing partner, operator, and co-owner thereof, and by Florence G. Baldwin, John Derrol Chace, also known as John D. Chace, Willis Sherman Clayton, Jr., also known as Willis S. Clayton, Jr., Arthur D. Curtner, also known as A. D. Curtner, John Kirk Dorrance, also known as John K. [3] Dorrance and as J. K. Dorrance, Rose L. Fitch, Margaret F. Coykendall, Hugh S. Hersman, also known as H. S. Hersman, Alfred A. Hapgood, also known as A. A. Hapgood, George H. Osen, Alfred L. Parkinson, also known as A. Leroy Parkinson, Sigurd C. P. Cornett, also known as S. C. Cornett, as executor of the will of Andrew R. Patrick, also known as A. R. Patrick, deceased, San Jose Hardware Co., a corporation, Nellie Shillingsburg, Anne Thompson, Sarah Shillingsburg Barry, formerly Sarah Shillingsburg, Margaret Leaman, and Ellen Weinstein, as executrix of the will of Samuel Weinstein, deceased, for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols: San Francisco Division IRA: 90:D ALW) dated February 28, 1944, and addressed to Bloomfield Ranch, and as a basis of this proceeding alleges as follows:

1. Petitioner, Bloomfield Ranch, is and during the period here involved was a partnership, as a

partnership is defined by section 3797 of the Internal Revenue Code and section 29.3797-4 of Regulations 111, or section 19.3797-4 of Regulations 103, and is a designation under which is carried the account for a group of persons hereinafter named who hold, as equitable co-tenants, in the name of M. E. Thomas, their agent, certain lands designated as Bloomfield Ranch, for the profitable resale thereof and for no other purpose.

The return for the period here involved was filed with the Collector for the First District of California.

The principal office of Bloomfield [4] Ranch is at the office of James A. Clayton & Co., 34 West Santa Clara Street, San Jose, California. Said lands, designated as Bloomfield Ranch, consisted during the year 1940 of 2,368 acres, more or less, of farm and cattle-range land lying within the Counties of Santa Clara, Santa Cruz, and San Benito in California.

The names of the members of said partnership so designated as the Bloomfield Ranch, and the co-owners of said lands, and equitable co-tenants thereof, and their respective undivided interests in said partnership and lands are:

Florence G. Baldwin, who owns a $1/14$ th interest,
John Derrol Chace, who owns a $1/14$ th interest,
Willis Sherman Clayton, Jr., who owns a $1/28$ th interest,

James A. Clayton & Co., a corporation, who owns a $3/28$ th interest,

Arthur D. Curtner, who owns a $3/28$ th interest,
John Kirk Dorrance, who owns a $1/14$ th interest,
Rose L. Fitch, who owns a $1/112$ th interest,
Margaret E. Coykendall, who owns a $1/112$ th interest,

Hugh S. Hersman, who owns a $1/14$ th interest,
Alfred A. Hapgood, who owns a $1/70$ th interest,
George H. Osen, who owns a $1/14$ th interest,
Alfred L. Parkinson, who owns a $5/56$ th interest,
Sigurd C. P. Cornett, as executor of the will of
Andrew R. Patrick, deceased, whose estate owns
a $1/14$ th interest, [5]

San Jose Hardware Co., a corporation, who owns
a $1/14$ th interest,

Nellie Shillingsburg, who owns a $2/70$ th interest
and a life estate in an additional $2/70$ th interest,

Anne Thompson, who owns a $2/210$ th interest,
subject to a life estate of Nellie Shillingsburg,

Sarah Shillingsburg Barry, who owns a $2/210$ th
interest, subject to a life estate of Nellie Shillings-
burg,

Margaret Leaman, who owns a $2/210$ th interest,
subject to a life estate of Nellie Shillingsburg,

Ellen Weinstein, as executrix of the will of
Samuel Weinstein, deceased, whose estate owns a
 $1/14$ th interest.

Sigurd C. P. Cornett was appointed executor of
the will of Andrew R. Patrick, deceased, in and
by the Superior Court of the State of California
in and for the County of Monterey.

Ellen Weinstein was appointed executrix of the
will of Samuel Weinstein, deceased, in and by the

Superior Court of the State of California in and for the City and County of San Francisco.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner [6] on February 28, 1944.

3. The taxes in controversy are income and declared value excess profits taxes for the calendar year 1940. The deficiencies asserted are \$6,646.60 income tax and \$4,159.58 declared value excess profits tax. The total amount of said deficiencies is in controversy.

4. The determination of taxes set forth in the said notice of deficiency is based upon the following errors:

(a) In determining the income tax of the petitioner, Bloomfield Ranch, the Commissioner erroneously determined that said petitioner was an association taxable as a corporation.

(b) In determining the declared value excess profits tax of petitioner, Bloomfield Ranch, the Commissioner erroneously determined that said petitioner was an association taxable as a corporation.

5. The facts upon which the petitioners rely as a basis of this proceeding are as follows:

(a) Petitioner Bloomfield Ranch is a partnership as defined in section 3797 (a) (2) of the Internal Revenue [7] Code and in section 29.3797-4 of Regulations 111, or section 19.3797-4 of Regulations 103, and has never been a corporation or an association within the meaning of section 3797 (a) (3) of the Internal Revenue Code, or within the

meaning of sections 29.3797-1 to 29.3797-4 of Regulations 111, or sections 19.3797-1 to 19.3797-4 of Regulations 103.

(b) Petitioner Bloomfield Ranch is not now and has never been a corporation.

(c) Petitioner Bloomfield Ranch has no officers and has no organization or representative management and it does not now and has never done business under the semblance of a corporation or of such an association as is included within the meaning of section 3797 (a) (3) of the Internal Revenue Code, or sections 29.3797-1 to 29.3797-4 of Regulations 111, or sections 19.3797-1 to 19.3797-4 of Regulations 103.

(d) James A. Clayton & Co., a corporation, is the managing partner and operator [8] and one of the co-owners of Bloomfield Ranch, but solely for the profitable resale of said land and the incidental upkeep of said land pending resale thereof. Petitioner Bloomfield Ranch is not and never was an enterprise for or engaged in the transaction of business generally or any activity except the profitable resale and incidental upkeep pending resale of certain definite lands acquired at the inception of the partnership and never increased or changed except by and through sales of parts thereof.

(e) The liability of the co-owners to persons dealing with Bloomfield Ranch through its managing partner and operator or otherwise has never been limited by agreement or otherwise.

(f) The petitioner Bloomfield Ranch does not now have and never has had capacity to enter into

contracts in its own name like an individual. Petitioner Bloomfield Ranch does not now have and [9] never has had capacity to take and hold and convey, or to take or hold or convey property in its own name like an individual, and it does not now have, and never has had, capacity to sue and be sued, or sue or be sued, in its own name like an individual.

(g) Petitioner Bloomfield Ranch has never been authorized to issue, and it never has issued, certificates of ownership.

(h) The method of filing returns as a co-partnership for petitioner Bloomfield Ranch has been approved by the Treasury Department with full knowledge of the facts for every year from and including 1926 up to the year here involved, to wit, 1940.

Wherefore, petitioners pray that this Court may hear the proceeding and determine that no deficiency is due from [10] petitioner Bloomfield Ranch for the calendar year 1940.

O. K. CUSHING,
EUSTACE CULLINAN,
DELGER TROWBRIDGE,
Counsel for Petitioners.

Of Counsel:

CUSHING & CUSHING, CULLINAN,
TROWBRIDGE & GORRILL,
#1 Montgomery Street
San Francisco 4, California. [11]

State of California,
County of Santa Clara—ss.

John Derroll Chace, Willis Sherman Clayton, Jr., Arthur D. Curtner, John Kirk Dorrance, Hugh S. Hersman, Alfred A. Hapgood, George H. Osen, Alfred L. Parkinson, Nellie Shillingsburg, Anne Thompson and Sarah Shillingsburg Barry, each being duly sworn, deposes and says:

That he is a partner in and co-owner of the petitioner Bloomfield Ranch, and makes this verification for petitioner Bloomfield Ranch, and for himself as a partner in and co-owner of Bloomfield Ranch; that he has read the foregoing, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated therein are true, except as to those facts stated to be on information and belief, and those facts he believes to be true.

JOHN DERROLL CHACE,
WILLIS SHERMAN CLAY-
TON, JR.,
ARTHUR D. CURTNER, [12]
JOHN KIRK DORRANCE,
HUGH S. HERSMAN,
ALFRED A. HAPGOOD,
GEORGE H. OSEN,
ALFRED L. PARKINSON,
NELLIE SHILLINGSBURG,
ANNE THOMPSON,
SARAH SHILLINGSBURG
BARRY.

Subscribed and sworn to before me this 9th day of May, 1944.

[Seal] E. B. DONOVAN,

Notary Public in and for the County of Santa Clara, State of California. My commission expires: October 1, 1946. [13]

State of California,
County of Santa Clara—ss.

Frazier O. Reed, being duly sworn, deposes and says:

That he is the President of James A. Clayton & Co., a corporation; as such is authorized to verify the foregoing petition; that James A. Clayton & Co. is the managing partner, operator, and one of the co-owners of said Bloomfield Ranch; that he verifies the foregoing petition for Bloomfield Ranch and for James A. Clayton & Co., as such managing partner, operator and co-owner of Bloomfield Ranch; that he has read the foregoing petition and is familiar with the statements contained therein and that the facts stated therein are true, except as to those facts stated to be on information and belief, and those facts he believes to be true.

FRAZIER O. REED.

Subscribed and sworn to before me, this 9th day of May, 1944.

[Seal] E. B. DONOVAN,

Notary Public in and for the County of Santa Clara, State of California.

My commission expires: October 1, 1946. [14]

State of California,
County of Santa Clara—ss.

Warren L. Holmes, being duly sworn, deposes and says:

That he is the President of San Jose Hardware Co., a corporation; as such is authorized to verify the foregoing petition; that he verifies the foregoing petition for Bloomfield Ranch and for the San Jose Hardware Co. as a partner in and a co-owner of Bloomfield Ranch; that he has read the foregoing petition and is familiar with the statements contained therein and that the facts stated are true, except as to those facts stated to be on information and belief, and those facts he believes to be true.

WARREN L. HOLMES.

Subscribed and sworn to before me, this 9th day of May, 1944.

[Seal] E. B. DONOVAN,
Notary Public in and for the County of Santa Clara, State of California.

My commission expires: October 1, 1946. [15]

State of California,
County of Santa Clara—ss.

Ellen Weinstein, being duly sworn, deposes and says:

That she is the duly qualified and acting executrix of the will of Samuel Weinstein, deceased, and was appointed such by order of the Superior Court

of the State of California in and for the City and County of San Francisco; that she makes this verification for petitioner Bloomfield Ranch and for the estate of Samuel Weinstein, deceased, as a partner in and co-owner of said Bloomfield Ranch; that she has read the foregoing petition and is familiar with the statements contained therein and that the facts stated are true, except as to those facts stated to be on information and belief, and those facts she believes to be true.

ELLEN WEINSTEIN,

Executrix of the will of
Samuel Weinstein, deceased.

Subscribed and sworn to before me, this 9th day of May, 1944.

[Seal] E. B. DONOVAN,

Notary Public in and for the County of Santa Clara, State of California.

My commission expires: October 1, 1946. [16]

State of California,
County of Santa Clara—ss.

Sigurd C. P. Cornett, being first duly sworn, deposes and says:

That he is the duly qualified and acting executor of the will of Andrew R. Patrick, deceased, and was appointed as such by the Superior Court of the State of California in and for the County of Monterey; that he makes this verification for petitioner Bloomfield Ranch, and for the estate of Andrew

R. Patrick, deceased, as a partner in and co-owner of said Bloomfield Ranch; that he has read the foregoing petition and is familiar with the statements contained therein and that the facts stated therein are true, except as to those stated to be on information and belief, and those facts he believes to be true.

SIGURD C. P. CORNETT,

Executor of the will of Andrew R. Patrick, deceased.

Subscribed and sworn to before me, this 9th day of May, 1944.

[Seal]

E. B. DONOVAN,

Notary Public in and for the County of Santa Clara, State of California.

My commission expires: October 1, 1946. [17]

State of California,
County of Ventura—ss.

Florence G. Baldwin, being first duly sworn, deposes and says:

That she is a partner in and co-owner of the petitioner Bloomfield Ranch, and makes this verification for petitioner Bloomfield Ranch, and for herself as a partner in and co-owner of Bloomfield Ranch; that she has read the foregoing, and is familiar with the statements contained therein, and that the facts stated therein are true, except as to

those facts stated to be on information and belief, and those facts she believes to be true.

/s/ FLORENCE G. BALDWIN,

Subscribed and sworn to before me, this 11th day of May, 1944.

[Seal] MAUDE MARKILLIE,

Notary Public in and for the County of Ventura, State of California.

My commission expires: Feb. 5, 1947. [18]

State of California,

County of Santa Clara—ss.

Rose L. Fitch and Margaret F. Coykendall, each being duly sworn, deposes and says:

That she is a partner in and co-owner of the petitioner Bloomfield Ranch, and makes this verification for petitioner Bloomfield Ranch, and for herself as a partner in and co-owner of Bloomfield Ranch; that she has read the foregoing, or had the same read to her, and is familiar with the statements contained therein, and that the facts stated therein are true, except as to those facts stated to be on information and belief, and those facts she believes to be true.

/s/ ROSE L. FITCH,

/s/ MARGARET F. COYKENDALL.

Subscribed and sworn to before me, this 9th day of May, 1944.

[Seal] E. B. DONOVAN,

Notary Public in and for the County of Santa Clara, State of California.

My commission expires: October 1, 1946. [19]

State of California,
County of Los Angeles—ss.

Margaret Leaman, being first duly sworn, deposes and says:

That she is a partner in and co-owner of the petitioner Bloomfield Ranch, and makes this verification for petitioner Bloomfield Ranch, and for herself as a partner in and co-owner of Bloomfield Ranch; that she has read the foregoing, and is familiar with the statements contained therein, and that the facts stated therein are true, except as to those facts stated to be on information and belief, and those facts she believes to be true.

/s/ MARGARET LEAMAN,

Subscribed and sworn to before me, this 11th day of May, 1944.

[Seal] WILLIAM F. SHAFFER,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires: June 17, 1947. [20]

SN-IT-7

EXHIBIT A

Form 1279

[Seal] TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE, 74 New Montgomery Street, San Francisco, 5, California.

Office of Internal Revenue Agent in Charge San Francisco Division. IRA:90-D. ALW.

Feb. 28, 1944

Bloomfield Ranch.

c/o James A. Clayton & Co.,
34 West Santa Clara Street,
San Jose, California.

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1940 discloses a deficiency of \$6,646.60 and that the determination of your declared value excess-profits tax liability for the year mentioned discloses a deficiency of \$4,159.58 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United

States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco, 5, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

HAROLD N. GRAVES,
Acting Commissioner.

/s/ By F. M. HARLESS,
Internal Revenue Agent in
Charge.

RR

Enclosures:

Statement

Form of Waiver [21]

Statement

Bloomfield Ranch
 c/o James A. Clayton & Co.
 34 West Santa Clara Street
 San Jose, California

Tax Liability for the Taxable Year Ended
 December 31, 1940

	Liability	Assessed	Deficiency
Income Tax	\$6,646.60	None	\$6,646.60
Declared Value Excess- Profits Tax	4,159.58	None	4,159.58

This determination of your tax liability, is made on the basis of information on file in this office.

You filed a return on Form 1065 as a partnership. It is held that you are an association as defined in section 3797 (a) (3) of the Internal Revenue Code, and are therefore, subject to tax as a corporation.

Adjustments to Net Income

Net income as disclosed by return, Form 1065.....	\$31,512.01
No change is made in net income reported.	
Taxable Net Income	<hr/> \$31,512.01

Computation of Declared Value Excess-Profits Tax

Net income for declared values excess-profits tax computation	\$31,512.01
Less: Credit of 10% of value of capital stock. (No capital stock tax return for the year ended June 30, 1940 was filed)	None
Amount subject to declared value excess-profits tax..	<u>\$31,512.01</u>
Amount taxable at 12% \$31,512.01 and tax.....	<u>\$ 3,781.44</u>
Total declared value excess-profits tax.....	\$ 3,781.44
Declared value excess-profits defense tax (10% of \$3,781.44)	<u>378.14</u>
Total declared value excess-profits and declared value excess-profits defense taxes assessable.....	\$ 4,159.58
Declared value excess-profits tax assessed.....	<u>None</u>
Deficiency of declared value excess-profits tax.....	\$ 4,159.58

Computation of Income Tax

Net income for declared value excess-profits tax.....	\$31,512.01
Less:	
Declared value excess-profits tax (cash basis).....	<u>None</u>
Normal tax net income.....	<u>\$31,512.01</u>
Income tax on \$25,000.00.....	\$ 3,775.00
Income tax on portion in excess of \$25,000.00— \$6,512.01 at 35%	<u>2,279.20</u>
Total income tax	\$ 6,054.20
Income defense tax:	
(If normal tax net income is less than \$31,964.30— \$377.50 plus 3.3% of income in excess of \$25,000.00) \$377.50 plus 3.3% of \$6,512.01.....	<u>592.40</u>
Total income and income defense taxes assessable....	\$ 6,646.60
Income tax assessed	<u>None</u>
Deficiency of income tax	\$ 6,646.60

[Endorsed]: Filed May 22, 1944. [23]

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioners, admits and denies as follows:

1. Admits that the return for the period here involved was filed with the Collector for the First District of California; admits that the principal office of Bloomfield Ranch is at the office of James A. Clayton & Co., 34 West Santa Clara Street, San Jose, California; and admits that the lands designated as Bloomfield Ranch lie within the counties of Santa Clara, Santa Cruz, and San Benito, in California; for lack of information and belief denies all other allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. (a) and (b) Denies that the determination of taxes set forth in the notice of deficiency is based upon errors as alleged in paragraph 4 and subparagraphs (a) and (b) thereunder of the petition.

5. (a) to (h), inclusive. Denies the allegations contained in subparagraphs (a) to (h), inclusive, of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ J. P. WENCHEL, TMM
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

T. M. MATHER,
ARTHUR L. MURRAY,
Special Attorneys.
Bureau of Internal Revenue.

ALM/lis 6/22/44.

[Endorsed]: Received and filed June 30, 1944.

Before the Tax Court of the United States
Docket No. 5007.

In the Matter of

BLOOMFIELD RANCH, by JAMES A. CLAY-
TON & CO., a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Before: Honorable MARIAN J. HARRON,
Judge.

Appearances:

Eustace Cullinan, Esq., and O. K. Cushing, Esq.,
1 Montgomery Street, San Francisco, California,
appearing on behalf of Bloomfield Ranch, by James
A. Clayton & Co., a Corporation, Petitioner.

Leonard A. Marcussen, Esq., (Honorable J. P.
Wenchel, Chief Counsel, Bureau of Internal Rev-
enue), appearing on behalf of the Commissioner of
Internal Revenue, Respondent. [29]

PROCEEDINGS

The Clerk: Docket No. 5007, Bloomfield Ranch,
by James A. Clayton & Co., a corporation.

Mr. Cullinan: Ready.

Mr. Marcussen: Ready for Respondent.

The Clerk: Will you state your appearances for the record.

Mr. Cullinan: Eustace Cullinan and O. K. Cushing of San Francisco, appearing for the Petitioner.

Mr. Marcussen: Leonard A. Marcussen appearing for the Respondent.

The Court: Will you proceed, Mr. Cullinan?

Mr. Cullinan: If the Court will indulge me, I will make rather a full opening statement. I think it will assist the Court and, perhaps, shorten the proceedings.

OPENING STATEMENT ON BEHALF OF THE PETITIONER

By Mr. Cullinan

Mr. Cullinan: This is a petition by members of a syndicate, or joint venture, as we call it, which is designated for convenience Bloomfield Ranch, and which we say, and expect to prove, is a partnership as that term is defined by Section 3797 of the Internal Revenue Code, that is to say it is an agent, or a syndicate, and not an association as that word is used in the Code definition of corporation. [30]

Now, the Commissioner viewing this group as a corporation has assessed for the taxable year 1940 a deficiency of \$6,646.50, plus a declared value excess profits tax deficiency of \$4,159.58.

Our petition asks that the Court determine that there is no deficiency.

There is no dispute about those amounts. If the Petitioner should be taxed as a corporation they

owe those amounts. If they are a partnership as defined by the statute they owe nothing.

The importance of this case to the Petitioners is that the decision here for 1940 will govern the tax liability for subsequent years.

Now, we do not expect much controversy over the facts. Many of the facts are admitted by the pleadings and others by a stipulation which will be presented at the beginning of the trial.

We have given the Commissioner and counsel complete access to all our records, and have permitted the government counsel to interrogate fully Mr. Frazier Reed, who will be our principal witness, in fact our sole witness.

With respect to those facts not admitted by answer or stipulation the Commissioner puts us on our proof not so much (at least we think so) because he has any doubt concerning the facts, but because he prefers to have them established [31] by our evidence. So the controversy is really not about what was done, but mainly, if not solely, as to whether what was done brings the Petitioners within the definition of a corporation as defined in the same Code Section.

It will, we think, clarify the issues and aid the Court if we state with some detail the facts which we expect to establish.

Now, in the early part of 1926 Miller & Lux, a great and very famous corporation, owned 21 separate parcels of land, substantially all ranches or ranch lands in the Counties of Santa Clara, San Benito and Santa Cruz, in California. The tracts

were widely scattered. The distance between the most northerly and the most southerly tract is about 14 miles, and between the most easterly and the most westerly tract about 13 miles.

The 21 ranches all designated generally Bloomfield Ranch, contain about 27, or did contain—we bought 27,500 acres. That is approximately equivalent to 43 square miles of land, consisting of lands suitable for various purposes, and including some swamp and overflowed lands and river bottoms, and land in but on the outskirts of the Town of Gilroy; about 42 acres included in the acreage at the outskirts of Gilroy out of the 27,500.

These properties, as I said, were called commonly and for convenience, the Bloomfield Ranch. Miller & Lux [32] operated the properties as one going concern on which it handled thousands of cattle, on which it raised most of the feed for those cattle, and on which it habitually employed approximately 200 men.

Now, it became known about the beginning of 1926 that these properties could be bought from Miller & Lux as a whole.

Now, James A. Clayton & Company is a California corporation, having its principal place of business in San Jose, California. It does business as a real estate agent and broker. Its business was founded by James A. Clayton in 1867. About 1880 a partnership was formed, consisting of James A. Clayton and his two sons, and thereafter the partnership did business as a real estate agent and broker until it was incorporated in 1903.

During all of that time, since 1867, the principal activity, first of Mr. Clayton, subsequently of the partnership, and since 1903 of the corporation, has been to act as agent for persons who wished to buy or sell real property.

The president of Clayton & Company is Mr. Frazier O. Reed, who will be a witness at the trial.

Now, Clayton & Company, having for very many years known about the Bloomfield Ranch lands, determined early in 1926, when they heard that the ranch could be bought, that they presented a favorable opportunity for purchase and [33] profitable resale, because while there were few available purchasers for the 27,500 acres as a whole of land of such very character, there was a very favorable market for selling the lands in separate parcels, which Miller & Lux did not care to do.

Now, Clayton & Company early in 1926 presented this opportunity to a number of its customers who would be willing to appoint Clayton & Company as their agent on a commission basis to buy and sell those properties. Clayton & Company advised each of those customers separately that if he would put up \$50,000 as one of thirteen others, including Clayton & Company itself, the properties could be acquired for approximately \$1,285,000, and that the balance of the purchase price above the \$700,000 to be put up by the fourteen investors could be borrowed.

Clayton & Company readily found thirteen customers willing to go into the investment, each putting up \$50,000, and in January and February

of 1926 Clayton & Company also contributed \$50,000. That made the fourteen.

The lands were acquired from Miller & Lux by three deeds—let me first say that all the money was contributed by the fourteen investors in January and February of 1926.

The lands were acquired from Miller & Lux by three deeds, each dated March 3, 1926, one for the land in each of the three counties. The sum of \$335,000 was borrowed from [34] the Bank of Italy, now the Bank of America. The other \$250,000 was borrowed from Miller & Lux. These two loans were secured by appropriate deeds of trust covering different parts of the Bloomfield Ranch, and those deeds of course were recorded March 10, 1926.

Now, the grantee named in the deeds was M. E. Thomas, who is a single woman, and who was then and still is employed by Clayton & Company. M. E. Thomas signed the notes to the lenders and, of course, signed the deeds of trust. Title was so taken in her name as a convenience. She never had any actual interest in the property.

Now, each of the investors, after he paid his \$50,000 to Clayton & Company, and after the purchase of the lands, received a receipt dated March 10, 1926, a copy of which will be presented in evidence. The receipt, so given to each investor separately, referred to James A. Clayton & Company as the operator, and provided that the operator was to use the \$50,000, together with other sums contributed by thirteen other persons referred to as investors, but not named, and other sums borrowed

or advanced by the operator in the purchase of the lands in question as described in those three deeds to M. E. Thomas.

We expect to show that when the respective receipts were issued the lands had already been acquired, as I have stated, so that all that remained to be done was to sell [35] those lands at a profit, and that was the purpose of the enterprise. The arrangement was confined to those particular lands. It was not to be an expanding or continuing venture. The receipts provided that the operator is to take and hold title to the properties originally in the name of M. E. Thomas, but may take such title in the name of any other person, or in its own name, and hold it, and this is the language of the receipt "For the profitable resale thereof."

The agreement provided that the operator might sell the properties, they might lease them for one season only, and might otherwise deal with the properties as the sole and absolute owners, subject to certain other restrictions which will appear in the document when introduced.

The operator was authorized to incur expenses out of the money received from sales or renting. The operator was to retain a commission of 5 per cent on the gross selling price of each parcel sold, and that is the only provision for commission in the receipt, as sales were made, and after payment of the expenses and the commission to return to the investor the whole or such part of the \$50,000, as, in the judgment of the operator, might be safely paid.

The receipt provided also that when all the properties have been sold and all the expenses and charges paid the remainder shall be divided equally among the investors, [36] their heirs and assigns. Each receipt provided that the respective investor shall be entitled to have an account rendered to him by the operator on demand, but not more often than once in sixty days. There was no limitation of the investor's liability expressed in the receipt.

Now, while each of these thirteen investors, other than Clayton & Company, received a separate copy of this receipt, which was signed by James A. Clayton & Company, and by the respective investors, the investors had no meeting before signing the writing, and some of them did not know who the others were. The investors received no other evidence of their investment at any time, and there was no other agreement with Clayton & Company, or between the investors, or among the investors themselves. There was no agreement signed by the investors with one another as such.

Now, when the lands were taken over from Miller & Lux, some parts of them were subject to existing leases and they were taken subject to those leases.

We shall show that the sole purpose of Clayton & Company and of those respective investors was to sell these lands as soon as possible and at a profit. Clayton & Company, however, informed the investors, and it was easily foreseen, that the sale of so large an amount of land could not be completed immediately. It was expedient, therefore, in order to keep the land clean and presentable for sale, [37]

and to earn some income while awaiting buyers, to execute leases of portions of the land for one season only. That, as I said, was provided in the receipts. No plan was made for operating the properties for gain, and no operation was contemplated beyond such that would be necessary for the proper care of the lands during the period between the purchase and the expected sales.

Now, the object of the agreement was to appoint an agent and define its duties for the purpose of profitable resale. Therefore, no provision was made for transfer of interests or limitation of liability or continuity of existence. The agency was expected to end when the property was sold and the proceeds accounted for. There was no plan to develop or subdivide the properties. Each purchaser was to select the part he wished to buy and it was then to be carved out of the whole.

The investors never organized in any way. They held no meeting, except that two or three times Clayton & Company called some of them together to consider income tax questions raised by the Bureau of Internal Revenue. The investors had no offices or directors; they had no office; they adopted no by-laws; had no seal, and kept no books except each investor's own books. No minutes were kept, no stock or other evidence of interest was issued, no vote was ever taken, no name was ever adopted. [38]

The investment was referred to by various names. The name "Bloomfield Ranch" was used by Clayton & Company in its income tax returns. No records or accounts of the investment as a separate

entity were kept. The only account was in Clayton & Company's books, and that was identical in form with the accounts of any other purchase-sale transaction, or any other client in the real estate business, showing on one side monies received by Clayton & Company, and on the other side monies paid out.

The interests of the investors were not intended to be and never were bartered, outside of transfers caused by deaths. In the nineteen years since 1926 eight transfers only of part interests have been made, and those between original investors, and these, as we shall show, were all for special reasons, either to others of the investors, or to relatives or business associates of the investors.

Now, your Honor is wondering what delayed us from 1926 in selling those lands.

Clayton & Company began selling the lands as soon as they were acquired. By the end of 1930 they had sold nearly 25,000 of the 27,500 acres, nearly 90 per cent, and had received on sales nearly one and a half million dollars. The exact amounts will be shown.

Now, the stock market crash of October, 1929, made itself felt in the sale of country lands during the year 1930. [39] So far as the Bloomfield Ranch was concerned, the effect became serious in 1931 and continued until 1943, as we shall show. Now, efforts to sell the land were continued to 1932, but were relaxed as they became ineffectual because efforts to press sales when there were no buyers at all and when there was no market would have pro-

duced a harmful effect later when the market should become active. Nevertheless, sales were made every time an opportunity to sell was found, and no reasonable offer was refused.

Of course, no one in 1931 thought that the depression so far as the sale of country lands was concerned would last twelve years. The effect of the depression was such that while, by the end of 1930 over 90 per cent of the acreage had been sold for nearly one and a half million dollars, as I have said, during the next ten years only 60 acres were sold and those for approximately \$22,000. In fact, the lands sold in those ten years were all sold for public purposes, for roads, or rights-of-way for public utility corporations which had a right to condemn.

Now, confronted with this situation Clayton & Company, as operator of the properties until sales could be made, had no resource except to operate or rent portions of the property suitable for farming in order to prevent them from deteriorating, and to avoid further loss.

Obviously, if the land were to be sold it had to be kept in good condition. That was done, but it was done, as we expect to show, as a maintenance and salvage operation. We shall show that there has been no deviation from the original plan to sell the properties as soon as possible, and no one has suggested a change, and there has been no change in the agreement.

The wait was longer than the investors expected, but the policy to sell the land at a profit was never

changed. The practice of renting lands when possible, and farming them when necessary while awaiting buyers was adopted from the first and never changed. It lasted longer because the depression came.

That is what happened, and that is all that happened. We hope to show that no part of the funds originally contributed by the investors, and no other money has been invested or re-invested to acquire other lands or property, and no exchange of property has ever been made. Sales were made only for money, and some capital was distributed to the investors on each sale, except small sales during the depression.

All monies that have come to the possession of Clayton & Company have been distributed to the investors as rapidly as possible. There has been no thought of extending the enterprise into new fields or activities.

We shall show that the project was nothing but a [41] partnership, as that is defined in the Internal Revenue Code, as I have stated. Now, that definition, of course, comprises more than the common law partnership. It includes groups or operations, lacking some of the characteristics of a common law partnership, such as responsibility of each member for the acts of the others.

We shall show that the Bloomfield Ranch did not operate in the ways of a corporation, did not do business as an association, as that word is used by the Code in the definition of a corporation. As your Honor knows, the word is used—the word “associa-

tion" appears both in the definition of a partnership and in the definition of an association in the Code. Now, we hope to show that they were not taxable as a corporation or as an association.

Now, so clearly as this is the case it seems to us, if the Court please, that the Bureau, with complete information, took the same view until about 1943, and advised the syndicate to file its returns on a partnership basis and accepted the turns as such.

Now, after the investors had paid to Clayton & Company the amounts of their investment, and had signed the respective receipts, and before the return for the Federal income tax was prepared for the year 1926, the late William F. Curry, an income tax accountant of San Jose, who was formerly connected with the Bureau, was sent to San Francisco by [42] Clayton & Company to discuss with the Office of the Bureau of Internal Revenue the nature of the enterprise, and to obtain advice as to the form of return to be filed.

As a result of several interviews with the Bureau he recommended to Clayton & Company to file returns on Form 1065. That is the partnership form.

The method of reporting income taxes that he recommended was adopted in 1926 and was followed thereafter to and including the return of 1943. A representative of the Bureau spent several days in Clayton & Company's office in 1930 examining the Bloomfield account and was supplied with all information that he required. During that year a representative of the Bureau, that is of the Office of the Internal Revenue Commissioner, questioned the base

price per acre of land sold as reported in the income tax return. In other words, the syndicate had bought the acreage as a whole for a fixed sum, and the Bureau wanted to establish a base price per acre. Now, the difficulty of that soon became apparent, and the Bureau and the taxpayer agreed upon a basis which was that on every sale 55.99 per cent should be deemed the cost, and 44.01 per cent should be deemed the profit. And they had the syndicate revise its partnership returns on that basis for the years 1930 and preceding, to 1926, and on the basis then adopted, as revised, all of the returns from that date to this have been based.

No other objection was ever made to the income tax returns that have been filed. The returns were all accepted by the Bureau until the return for 1940 came under examination.

Now, we expect to convince the Court from the facts to be proved, and the decisions to be cited in our briefs, that the Commissioner was right through the first eighteen years in regarding the Bloomfield Ranch as a partnership, and that he erred when in his ninety-day letter of March 6, 1944, he turned about and held that the Bloomfield Ranch should be taxed as a corporation.

We expect to establish with these facts and from the decisions that the Bloomfield Ranch is not a corporation, should not be taxed as such, but it comes well within the Code definition and the Code concept of "partnership," which is—I am reading now from the Code Section—"The term 'partnership' includes a syndicate, group, pool, joint ven-

ture, or other unincorporated association through or by means of which any business, financial operation or venture is carried on, and which is not within the meaning of this title a trust or estate, or a corporation, and the term 'partner' includes a member in such a syndicate, group, pool, joint venture, or organization."

The Court: I think that is a very complete statement, Mr. Cullinan, and I will ask counsel for the Respondent [44] to state what his position is.

OPENING STATEMENT ON BEHALF OF THE RESPONDENT

By Mr. Marcussen

Mr. Marcussen: If your Honor please, the Commissioner has determined that for the taxable year 1940 Respondent is an association within the meaning of Section 3797(a) of the Internal Revenue Code.

Before going into a discussion, however, of our position generally, I would like to make a few remarks with respect to comments made by counsel as to our previous dealings in developing the case.

In the first place, none of the facts, so far as I know, are admitted in the Answer. I think that that was an inadvertence on the part of counsel. All of the facts, the material facts have been denied. We have, however, entered into a stipulation which covers some of the facts, and I am at a loss to know exactly what counsel refers to when he said that we preferred to put Petitioner on his proof with respect to some points.

I want to say that the stipulation as originally presented by counsel was not acceptable to the Respondent and an agreement was made to eliminate certain elements from the petition or, rather, from the stipulation. And it was indicated at that time that the reason therefor was that we regarded them as not material. We have, however, stipulated [45] in the original stipulation everything we regarded as being material to the case. And I might say also that in view of our high estimation of counsel we were quite willing to do that, notwithstanding the fact that we had not indicated at that time what facts we would like to have stipulated. Counsel gave us assurance that those facts would be made available to us, and he has been very cooperative, and has made the facts available to us, and we were, therefore, quite content to develop the facts without an investigation but merely by means of conferences with counsel, and we are more or less agreed as to what items may be submitted in evidence and what items may not be submitted in evidence.

Mr. Cullinan: I may say, of course, I did not mean to bind counsel for the Commission by my statement that I did not think there was any dispute as to the facts. I still don't think there is going to be any dispute.

Mr. Marcussen: I might say that I quite agree with counsel, I don't think we will have much of a dispute as to any of the facts.

Now proceeding generally as to our position, it is the position of the Respondent that the taxpayer is an association under the Internal Revenue Code,

and also under the decision of the Supreme Court in *Morrissey vs. the Commissioner*, decided in 1935.

Now, the general tests as to what constitute an association, as I understand it, and as it was set forth by the Supreme Court in that case, is that, one, there must be actually an association, and I think we will show that an association does exist here, and, secondly, that the association was organized primarily for a business purpose, and I think there will be no dispute as to the facts with respect to that point, and, thirdly, that the association was operated primarily after the form and manner of a corporation.

Now, I think the Supreme Court laid down the salient features of the corporation in that case and stated that they consisted of the following: In the first place, a continuing entity throughout the business period. The Court in that case had a trust, and in this case we will attempt to show that there has in effect been a trust arrangement established between Clayton & Company, on the one hand, as operator, and with the investors, thirteen other investors and also Clayton & Company as an investor on the other hand.

The second item of corporate form which the Supreme Court referred to in the *Morrissey* case is the centralized management that is provided by an association. I think we will show here that centralized management was provided by Clayton & Company, a corporation, which was one of the investors in this association, and which was the manager. [47]

The third point referred to by the Supreme Court,

and which exists in this case, is continuity uninterrupted by death among the beneficial owners. We will show there was no interruption of the association's business activities throughout the entire period of its existence by reason of the death of any of the partners.

We will also show that the fourth point mentioned by the Supreme Court in the *Morrissey* case exists in this case, and that is that means existed for the transfer of the beneficial interests. While it is true that, I think, as I recall, the agreement itself makes no specific reference to transfer, the facts show that transfers did in fact take place, not only transfers which were occasioned by the death of some of the investors, but also transfers *inter vivos* from one investor to other parties. I think counsel has stated the only transfers made *inter vivos* were to other investors.

Mr. Cullinan: Yes. I corrected it afterwards in the statement.

Mr. Marcussen: That was an incorrect statement. There were other transfers to new parties. And I might say in passing, with respect to that point, that it should be borne in mind that the interest involved here is a rather substantial interest. I refer to the shares. They are \$50,000 shares. And it, I think, is quite clear from the [48] start that such sizable shares, interests, beneficial interests are not very readily transferable, but the fact was that all the transfers that were made were recognized by the operator under the trust agreement.

Lastly, the fifth point provided for by the Su-

preme Court in the Morrissey case was limitation of the personal liability of the participants. I think that there is no question but their liability in this case was limited. While there is again, I think, no specific reference in the trust agreement, I think it is quite clear that the legal consequences flowing from that agreement show that there is a limited liability.

Now, reference has been made by counsel to the fact that there have been no officers, that there have been no meetings, I believe, and numerous other things which were regarded by the Supreme Court in the Morrissey case and in other cases as mere formalities and not the salient features which must be present or, rather, which are not the usual features of a corporation.

And I might say also that I think there is an indication in the decisions that every one of the five points referred to by the Supreme Court in the Morrissey decision are not necessarily a prerequisite to a finding by the Court that a corporate form exists in a particular case.

I might say also merely briefly in passing that counsel has referred to what I regard as a far more lofty document than a mere receipt. He has referred to it as a receipt. It is actually a formal agreement which exists between the operator on the one hand and each one of the investors on the other. And it also refers to the fact that the property which was purchased was purchased and to be held in trust by the operator for the benefit of the beneficial owners.

But regardless of whether it is found that the

agreement constituted a trust it is submitted that whatever the agreement stands for it is sufficient to form the basis of corporate liability in this case.

I don't think there is any point in my going into further argument as to facts which may or which may not be adduced here at the hearing, so with that I will close my opening statement.

The Court: Very well. Will you call your witness, Mr. Cullinan:

Mr. Cullinan: Yes. I want to present a stipulation of facts first. I think it will be more in order. We have stipulated as to the facts so far as we could get together on them, and I present now, if the Court please, two signed copies of the stipulation.

Perhaps, I should read the stipulation.

The Court: Ordinarily we don't do that. I do read [50] it while I am listening to the evidence.

The stipulation is received and made part of the record. Are there any exhibits attached to the stipulation?

Mr. Cullinan: No, your Honor.

The Court: Are you going to offer it?

Mr. Cullinan: Well, the substance of the stipulation, I might say, has really been covered to a large extent in my opening statement, except that the stipulation contains a much fuller description of the varieties of land, and it contains the names of the original investors. I mention this, so that I am not going over all this stipulated ground with Mr. Reed, and your Honor may think there are gaps in the evidence unless you have some notion of what is in the stipulation.

It contains the names of the original investors, it contains a statement of every change that has been made in ownership from the beginning, and it contains the names and respective interests of the investors at present. It contains in more detail the statements that I have made with respect to the sales of land to and including 1940, and the statement of what occurred after the market crash of late October, 1929.

The Court: Are you going to offer any documents as exhibits?

Mr. Cullinan: I have a number of documents I am [51] going to offer.

The Court: During the course of the testimony?

Mr. Cullinan: During the course of the trial.

I would first, however, ask Mr. Marcussen to produce the original partnership return of 1940 of the Bloomfield Ranch.

Mr. Marcussen: If your Honor please, I was going to submit the return in evidence myself. If counsel wishes to submit it, that is quite all right.

The Court: Yes.

Mr. Cullinan: This is the original return, however, and in submitting it I would like leave to get the original back and substitute a copy at some later date.

The Court: I think it will be easier, Mr. Cullinan, if you have no objection, if Mr. Marcussen introduces that as Respondent's Exhibit "A". It is easier in connection with their getting photostats.

Mr. Cullinan: It is quite all right.

The Court: Do you want to offer it now?

Mr. Marcussen: Yes, I will offer it, your Honor.

The Court: All right, the return is received as Respondent's Exhibit "A".

Mr. Cullinan: Do you want to withdraw the original and I will supply the copy right now?

Mr. Marcussen: Very well. [52]

The Court: I expect you prefer substituting photostats, don't you?

Mr. Marcussen: Yes. The habit is, I understand, for a photostat to be substituted in Washington.

The Court: Yes. They have a procedure, Mr. Cullinan, of having these documents photostated in Washington.

A photostat copy of the return may be substituted for the original.

(The income tax return referred to was marked and received in evidence as Respondent's Exhibit "A".)

[Respondent's Exhibit "A" set out on pages 191 to 196.]

Mr. Cullinan: Mr. Reed, will you take the stand, please?

Mr. Marcussen: If your Honor please, for the record, I would just like to make a comment before we go on with Mr. Reed, that the return in this case was filed in the First District of California.

The Court: What was that?

Mr. Marcussen: I think the return shows, if you have it there, that it was filed before the Clerk of Internal Revenue in the First District of California.

The Court: All right.

Whereupon,

FRAZIER O. REED

called as a witness for and on behalf of the petitioner, [53] having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Give your name and address.

The Witness: Frazier, F-r-a-z-i-e-r, O. Reed, R-e-e-d.

By Mr. Cullinan:

Q. Mr. Reed, you are the President of Clayton & Company, are you not? A. I am.

Q. And you have been since when?

A. About 1916.

Q. And you were the active member of Clayton & Company that formed this group which we call the Bloomfield Syndicate, were you not?

A. Yes.

Q. How active were you in that connection?

A. Well, I did most of the work.

Q. Well, did you have any familiarity with the Miller & Lux lands, called the Bloomfield Ranch prior to 1926?

A. Yes. I have been in the real estate business a long time and have sold a lot of land in and around the Miller & Lux holdings in the three Counties. Therefore, I was quite familiar with the Miller & Lux holdings.

Q. How, when you, acting for Clayton & Com-

(Testimony of Frazier O. Reed.)

pany, formed [54] the opinion that the land could be bought for profitable re-investment, what did you do?

A. I talked with different men with whom I had been in the habit of forming syndicates and purchasing lands for resale, and I talked with not all of them at the beginning, but knew that I would be able to have enough to take over the land whenever we needed to do so. And then I began negotiating with Mr. Ficket, the then President of Miller & Lux, here in San Francisco. And then, oh, we negotiated probably for about a month, and if I remember correctly, we paid Miller & Lux a deposit of \$50,000 on January 28, 1926. That is easy to remember because that is my birthday.

Q. Mine also, I might say.

A. Is that so? Well!

Then I went about talking with other investors. In fact, after the transaction was known to the public, I was criticized considerably by a very good——

Mr. Marcussen (interposing): If your Honor please, I object to statements of that kind.

Mr. Cullinan: Yes.

Mr. Marcussen: They are entirely immaterial.

Mr. Cullinan: If you will confine your answer to the question, please. Mr. Reed.

Let me ask this:——

The Court (interposing): Perhaps, the witness has [55] forgotten exactly what the question was.

Why did you want to refer to that, why did you want to refer to the general criticism?

(Testimony of Frazier O. Reed.)

The Witness: Well, simply to show that——

Mr. Marcussen (interposing): May we have this off the record, your Honor?

The Court: No. I asked the question.

The Witness: Simply to show that it was not difficult to obtain customers to become syndicate members in the venture, and that the criticism I received was from other customers who we did not invite to participate.

The Court: Well, that would all be immaterial, I should think, anyway.

Would you pick up again with a question? A witness is bound to go beyond the scope of a question.

Mr. Cullinan: I am trying to avoid asking the witness about matters covered in the stipulation already, you see.

The Court: Well, I might say in connection with that that this stipulation is rather short. A good deal of what is covered by the stipulation was covered by your opening statement, and I would suggest that you feel free to go ahead without too much consideration of repetition. It isn't enough repetition for you to worry about.

Mr. Cullinan: Perhaps, you don't know the witness, [56] if the Court please.

The Court: Well, we will watch the witness.

The Witness: I am at a loss to know what he means.

The Court: Maybe he means you like to tell stories to us.

(Testimony of Frazier O. Reed.)

Q. (By Mr. Cullinan): Mr. Reed, to what extent did each of the investors know who the others were?

A. Well, some who were always in syndicates that we formed knew about the others, but there are some syndicate members who even at this date did not meet all of the other syndicate members. I am quite sure that Mr. Patrick died before any of the syndicate members knew him, had the pleasure of meeting him.

Q. Yes.

A. That holds true with other members of the syndicate.

Q. Now, with reference to March 3, 1926, when was the money collected from all fourteen of the investors?

A. Well, I do not recall whether it was all collected before the deeds were paid for. That is all revealed by that statement that we gave Mr. Marcussen.

Q. Yes.

A. But it was—I suspect it was before we paid for the deed. [57]

Q. Well, then, if you don't know that of your own knowledge we will prove it otherwise.

A. I can tell you in a minute if you want to wait (examining document). I think it was all paid in—before March 10th.

Q. Yes. Now, then, I show you a document purporting to bear the signatures of James A. Clayton & Company and J. P. Dorance, investor, dated

(Testimony of Frazier O. Reed.)

March 10, 1926, and I will just ask you to tell the Court what this document is.

That is the original (handing document to Mr. Marcussen).

A. (Examining document): This is the receipt issued by James A. Clayton & Company for the \$50,000 which Mr. Dorance had paid in the joint venture. While we had formed many syndicates before this, we had never——

Mr. Marcussen (interposing): If your Honor please, I object to that.

The Court: Go ahead, Mr. Reed.

The Witness: This is the first time we had ever had a written agreement. All syndicates formed prior to that were purely verbal, but because of the——

Mr. Marcussen (interposing): I object to that, your Honor, as being wholly immaterial.

Q. (By Mr. Cullinan): Just state what this document is.

A. I said it is the receipt which we issued to Mr. Dorance when he paid us the \$50,000 which was his share of the joint venture.

Q. Now, then, is it different in form from the receipts issued to each of the other thirteen, the other thirteen investors who went into this syndicate?

A. It is identical, the others are identical with this.

Mr. Cullinan: We offer in evidence the receipt issued March 10th to Mr. Dorance, if the Court

(Testimony of Frazier O. Reed.)

please, and ask that it be marked Petitioner's Exhibit No. 1.

The Court: Any objection?

Mr. Marcussen: No objection.

The Witness: This is the only agreement that Clayton & Company has with this syndicate member.

The Court: That is all right, you are going beyond—you are talking out of turn now.

That may be marked as Petitioner's Exhibit 1, and is received in evidence.

(The receipt referred to was marked and received in evidence as Petitioner's Exhibit No. 1.)

[Petitioner's Exhibit No. 1 set out on pages 167 to 170.]

The Witness: My reason for——

The Court: Just a moment now.

Mr. Cullinan: If the Court please, I have copies of that receipt, and Mr. Reed would like to keep it for his file. It is the only record he has. I am going to ask the [59] Court to permit us to withdraw the original receipt and substitute a copy.

I think you have seen the copies, haven't you?

Mr. Marcussen: I haven't seen the copies, but I have no objection to the submission of a copy, provided that there can be any correction for any inaccuracies we can find.

Mr. Cullinan: That is all right.

The Court: Subject to check by counsel for respondent a copy, a typewritten copy may be substituted for the original as Exhibit 1.

(Testimony of Frazier O. Reed.)

Mr. Cullinan: Yes. Thank you.

If the Court please, I will ask counsel for the Commission whether he is willing to stipulate that all the other receipts given to the different investors were identical in form except as to the name of the investor and the signature of the investor?

Mr. Marcussen: I shall be glad to stipulate to that if that is counsel's assurance.

Mr. Cullinan: Yes, I have all the originals here, but I am just trying to avoid loading the record with repetitions of the same document.

Q. (By Mr. Cullinan): Now, Mr. Reed, was any other document given to any other member of the original investors? A. No. [60]

Q. Was there any writing at any time other than these fourteen separate so-called receipts evidencing the transaction? A. No.

Q. Clayton & Company as one of the fourteen also signed, received and signed a similar receipt?

A. That is right.

Q. And put up its \$50,000 along with all the other investors in this group?

A. That is correct.

Q. Now we may as well clean up the matter of transfers while we are on the subject of receipts.

Were there any changes made in the group of investors of the ownership of the lands?

You will recall that the changes are specifically set forth in the stipulation. I am just asking for a "Yes" or "No" answer there. The details are all in the stipulation. A. Yes, sir.

(Testimony of Frazier O. Reed.)

Q. How were those changes evidenced?

A. Simply by an assignment from the original investor to another member of the syndicate.

Q. Now, you procured for me, did you not, a photostat copy of the documents, all the documents evidencing any assignment or change in ownership?

A. I did.

Q. And you brought me only one photostat, one set?

A. That is correct.

Q. That is because you had no time?

A. Shortness of time.

Mr. Cullinan: Now, if the Court please, I have asked Mr. Marcussen if he will allow us to introduce these photostats, and I will promise to supply him with other copies and ourselves too, because we have no copies either of these. We have the originals, but I would rather put in the photostats if there is no objection.

Mr. Marcussen: There is no objection so long as I may see the originals during the course of the trial, and if you will supply us with a copy later.

Mr. Cullinan: Yes, the originals are all here in front of me.

The Court: Are those the photostat copies of the other receipts?

Mr. Cullinan: They are the photostat copies of whatever documents there were evidencing a change of ownership from the original investors.

The Court: Oh, I see.

Mr. Cullinan: Except where the change of ownership was caused by death, and under the law

(Testimony of Frazier O. Reed.)

of succession where there was—in other words, through decrees of distribution [62] of the Court. The facts are recited in the stipulation, but they are not particularly material here. The changes to which counsel for the Commissioner attaches significance are the ones that were made by living investors.

The Court: Who, I suppose, sold their interests, that is, they made their assignments for a consideration?

Mr. Cullinan: Well, Mr. Reed can answer that. One of them, at least, sold; others were made for other reasons; some to relatives, and one merely to a corporation owned by the original investor. He preferred to keep his title in the name of a corporation.

The Court: Is that your understanding?

The Witness: Yes.

Mr. Marcussen: Counsel, don't they show right on their face they were sold for a consideration?

Mr. Cullinan: Well, some of them. Now, they may recite a consideration. I am just going to read them.

Mr. Marcussen: Yes.

Mr. Cullinan: For example, we offer this document with the handwriting on the top of it (I say this for identification) "Willis Sherman Clayton, Jr.", and is dated San Jose, California, April 30, 1941.

Perhaps, I had better read it because they are all very much the same. The first one I had better read to your Honor. [63]

(Testimony of Frazier O. Reed.)

It is attached to a copy of the original receipt to W. S. Clayton individually. He was one of the original investors. Now, then, he made the transfer which is noted in the stipulation, and this is the documentary evidence of that transfer and the form of it.

“San Jose, California, April 30, 1941.

“This is to acknowledge that Willis Sherman Clayton, Jr., is now the owner of one-half of the undivided one-fourteenth interest in and to the balance of the assets, both real and personal, belonging to the Miller & Lux Syndicate as evidenced by the receipt and agreement dated March 10, 1926, between James A. Clayton & Co. as operator and W. S. Clayton as investor, a copy of which is attached hereto and made a part hereof, the same having been distributed to him by the final decree of distribution in the Estate of Willis Sherman Clayton, deceased, dated April 15, 1941.”

That is signed by “James A. Clayton & Company, by Frazier Reed, President,” and underneath that on the same page appears the following:

“San Jose, California, April 30, 1941.

“I hereby acknowledge that one-half of the undivided one-fourteenth interest in and to the balance of the assets, both real and personal, of the foregoing syndicate was distributed to me by the final decree of distribution in the Estate of Willis Sherman Clayton, deceased, April 15, 1941.”

(Testimony of Frazier O. Reed.)

Signed "Willis Sherman Clayton, Jr.," and underneath that, still on the same page, this writing: "San Jose, California, April 30, 1941.

"The undersigned as operator named in said receipt and agreement hereby accepts notice of the foregoing assignment."

Signed "James A. Clayton & Company, by Frazier O. Reed, President."

Now, we would like to offer that as the petitioner's Exhibit No. 2, isn't it?

The Court: 2. That is received in evidence as Exhibit 2.

The parties have agreed that photostat copies may be substituted for the originals?

Mr. Cullinan: Yes, your Honor.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 2.)

[Petitioner's Exhibit No. 2 set out on pages 172 to 176.]

Mr. Cullinan: Now, I have a document bearing at the top, and for identification "J. B. Clayton to Baldwin."

Q. (By Mr. Cullinan): Is that correct? [65]

A. That is right.

Mr. Cullinan: That recites—this is the photostat copy, of course.

Q. (By Mr. Cullinan): Who is J. B. Clayton? He was the J. B. Clayton referred to in the previous Exhibit No. 2, was he not?

(Testimony of Frazier O. Reed.)

A. He is a brother of Willis Sherman Clayton, Jr., and they are sons of W. S. Clayton, who is deceased.

Q. I see. And who was Olive Clayton?

A. J. B. Clayton's wife.

Mr. Cullinan: Now, this document reads as follows:—

The Court: Are you going to read all of these into the record, Mr. Cullinan?

Mr. Cullinan: I will not if your Honor doesn't want it.

The Court: I don't think you need to. The point is that there was evidence of some transfers. The transfers are described rather fully in the stipulation of facts, and these documents supplement what has been stipulated.

Mr. Cullinan: That is right.

The Court: I think you just take up the record, you just run up your record by reading those. I don't think it is necessary.

Mr. Cullinan: Well, I quite agree with your Honor.

The Court: If you want me to notice something special [66] about some of these I will read them. I usually get things better if I read them. If you want me to read some of those or look at a particular paragraph, just point it out to me.

Mr. Cullinan: Well, I am not so keen about having you read them, if the Court please, as I think counsel for the Commissioner is.

Shall I offer them separately or offer them as a bunch?

(Testimony of Frazier O. Reed.)

The Court: I would offer them one after another. Just identify each one by the name of the assignee.

Mr. Cullinan: As Petitioner's No. 3, if the Court please, I offer this document signed by J. B. Clayton and Olive Clayton, referring to a transfer to Florence G. Baldwin.

The Court: Without objection, that is received as Petitioner's Exhibit 3.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 3.)

[Petitioner's Exhibit No. 3 set out on pages 172 to 173.]

Mr. Cullinan: And then as Commissioner's Exhibit No. 4, I offer a document signed by Florence G. Baldwin, dated June 9, 1941, transferring certain interests, which I will not stop to specify, to James A. Clayton & Co.

Mr. Marcussen: Is that Baldwin to Clayton, Mr. Cullinan?

Mr. Cullinan: That is Baldwin to Clayton & Co.

Mr. Marcussen: Yes. No objection.

The Court: Received in evidence as Exhibit 4.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 4.)

[Petitioner's Exhibit No. 4 appears on pages 174 to 175.]

(Testimony of Frazier O. Reed.)

Mr. Marcussen: Now I offer in evidence as Petitioner's Exhibit 5 a document signed by George H. Osen, O-s-e-n, dated February 17, 1914, and referring to an assignment to himself and his son in joint tenancy, and containing a statement below of the ratification by George A. Osen, and a receipt of notice by Clayton & Company.

The Court: Received in evidence as Exhibit 5.

Mr. Marcussen: No objection.

(The document referred to was marked and received in evidence of Petitioner's Exhibit No. 5.)

[Petitioner's Exhibit No. 5 appears on pages 175 to 177.]

Mr. Cullinan: Now I offer in evidence as Plaintiff's Exhibit No. 6, Petitioner's Exhibit No. 6, a document signed by Thomas Scoble, dated December 13, 1927, containing an approval and confirmation by Alice G. Scoble, by Thomas Scoble, her attorney in fact, and a statement at the bottom by Arthur D. Curtner, that he agrees to comply with all of the terms and conditions contained in said receipts.

I offer this as Petitioner's Exhibit No. 6.

I would like to ask a question about that of the witness.

Mr. Marcussen: Very well. [68]

By Mr. Cullinan:

Q. Mr. Scoble was one of the original investors, was he not, Mr. Reed?

A. Yes, sir.

(Testimony of Frazier O. Reed.)

Q. And that transfer was made shortly after the 1927—not long after the inception of the project?

A. That is right.

Q. Why was that transfer made?

Mr. Marcussen: I object to that, your Honor.

The Court: State the ground of your objection.

Mr. Marcussen: Hearsay, being entirely immaterial.

The Court: I want you to state the grounds of your objection.

Mr. Marcussen: In the first place it is hearsay, and it is also immaterial as to why the transfer was made. This witness is not able to state that.

The Court: Will you answer that?

Mr. Cullinan: I think the witness may know why the transfer was made.

By Mr. Cullinan:

Q. Do you know why the transfer was made?

A. Yes, sir.

Mr. Marcussen: I still object to that, your Honor, as being entirely hearsay.

Mr. Cullinan: Our purpose is to show that these [69] transfers were made by reason of very special and particular circumstances in each case, such as death, or other pressing circumstances, and to establish clearly that the receipts were not traded on, or the interest traded on or bartered generally like stock of a corporation.

Mr. Marcussen: I object to that, your Honor.

The Court: Well, is there any other evidence than the testimony of this witness that could be offered to bring out the fact that you have in mind?

(Testimony of Frazier O. Reed.)

Mr. Cullinan: Well, I don't know that anybody knows any better than the witness on the stand because he had the discussions with Mr. Scoble, and it was through him that the exchange was facilitated.

The Court: Is that correct, Mr. Reed?

The Witness: That is right.

The Court: Objection overruled.

By Mr. Cullinan:

Q. What were the circumstances surrounding this transfer by Mr. Scoble?

A. Mr. Scoble, after he had paid us \$50,000 for a one-fourteenth interest in the Bloomfield syndicate, decided that as a result of our active selling that all land in California might be sold as easily, therefore, purchased a subdivision on the Russian River, and it didn't work the way that Bloomfield worked because we sold in the first [70] year, or less than a year, over \$600,000 of the property. And when he found himself in financial trouble he came to me and said that he would like to be really rid of the interest in Bloomfield.

Then it was that I got Mr. Curtner, another member, and Mr. Parkinson, another member of the syndicate, and Mr. Curtner's partner, Mr. Fitch, to purchase that interest from Mr. Scoble.

Mr. Marcussen: Now, if your Honor please, I object to all that as being not within the issues of the case. It is entirely immaterial what the motive for the transfer of any of the interests by the investors was, and, furthermore, it is clearly hearsay.

(Testimony of Frazier O. Reed.)

This witness isn't competent, it seems to me, to testify as to what the motive of one of the investors was in selling his share in the association.

I move that that be stricken from the record.

Mr. Cullinan: If the Court please, one of the positions taken by the government is that the syndicate did business as a corporation, and one of the evidences of that on which the government relies is that certain transfers were made of the original interests, and that is likened to sales of stock. And my purpose is to show that these sales were not made on the market, or to strangers, but they were all made under very special circumstances, and as must have happened with any syndicate of this kind which lasted from [71] 1926 to 1945.

Mr. Marcussen: Well, if your Honor please, I think that the special circumstances, or any special circumstances which may exist on the transfer of any of these interests are entirely immaterial.

Secondly, I am willing to stipulate that these shares were not listed on any stock exchange and were not traded on any exchange.

Mr. Cullinan: Well, that stipulation hardly goes to the root of the matter.

Mr. Marcussen: Well, that is the point you wish to bring out, Mr. Cullinan?

Mr. Cullinan: No.

The Court: No, I don't think so. The fact that we have the witness' testimony that there was a transfer by sale of Mr. Scoble's interest to three persons—is that right?

(Testimony of Frazier O. Reed.)

Mr. Cullinan: Two, one of whom was the original——

The Court: (interposing) Curtner, Parkinson and Fitch; isn't that three. Yes. And that testimony establishes that to be a fact.

The objection that the intent is immaterial, and that the witness is not competent to testify about the intent gives me some trouble. I think that the intent is material. The competency of the witness to testify about the transaction [72] has not been established, perhaps, as it should be in view of the fact that there is an objection.

Now, I think, Mr. Cullinan, you probably ought to cure that objection, as I think you can, because I think, apparently from Mr. Reed's testimony, he negotiated this transfer of interests. He testified that he obtained three persons who were willing to take over the interests of Mr. Scoble.

Mr. Cullinan: Yes.

The Court: I think it would be material to know something about that transaction. You may not have had this in mind, but I would like to know whether the interest of Mr. Scoble was sold at a very large profit or a nominal profit, or no profit, or at a loss. That is all involved in this argument of the Respondent, that these interests could be sold like a security.

Mr. Cullinan: Yes.

The Court: I think you should develop that a little more, if I may suggest that to you. For the present I will overrule the objection that has been made.

(Testimony of Frazier O. Reed.)

I think we should take a recess for just a minute for the Reporter.

(Short recess.)

By Mr. Cullinan:

Q. Mr. Reed, there was a transfer of an interest from [73] A. E. Holmes to the San Jose Hardware Company, was there not?

A. Yes.

Q. Will you recite the circumstances of that transfer?

A. The receipt was issued to Warren L. Holmes, and then he elected to transfer it to the San Jose Hardware Company, which was owned by him and his father. And then the San Jose Hardware Company was subsequently incorporated. You have orders there to show the assignments.

Mr. Cullinan: Now, if the Court please, we offer in evidence a document on the letterhead of the San Jose Hardware Company signed "San Jose Hardware Company, A. E. Holmes, President, and W. S. Holmes——" is it?

The Witness: W. L.

Mr. Cullinan (Continuing): "——W. L. Holmes, Secretary," attached to which is a letter—that is dated August 10, 1928, and attached to it a letter addressed to James A. Clayton & Company, dated October 17, 1928, and signed by W. L. Holmes. We ask that they be marked as Petitioner's Exhibit next in order.

The Court: 6.

(Testimony of Frazier O. Reed.)

Mr. Cullinan: No. 8 this will be.

The Clerk: 7.

The Court: Well, just a minute. The document that was offered as 6 may not have been received in evidence. There [74] was some question about it.

Mr. Marcussen: Is that the Scoble?

The Court: That is the Scoble.

Mr. Marcussen: I would like to call your attention, if your Honor please, to numerous other transfers that are attached to that which you probably want to put in evidence, introduce before you introduce this. You referred to Exhibit 6 as consisting only of a transfer of one-half interest to a man by the name of Curtner, I believe, and there are three other transfers on that exhibit.

Mr. Cullinan: Oh, the other exhibit, yes.

Will you hand me the last exhibit, please?

(The document was handed to Mr. Cullinan.)

Mr. Marcussen: The exhibit is identified, however, only as the transfer to Curtner.

Mr. Cullinan: Yes. Referring now to Petitioner's Exhibit 6, this is a group of transfers by Scoble, one to Arthur D. Curtner, one to Harry H. Fitch, and one to a LeRoy Parkinson, those three transfers, and they are all attached to a copy of the original receipt issued to Thomas Scoble. And at the bottom of that copy of the original receipt is a note in the handwriting of Mr. Reed: "This copy was surrendered by Thomas Scoble today to complete the transfer to Curtner, Fitch and Parkinson," dated "December 13, 1927." [75]

(Testimony of Frazier O. Reed.)

The three together cover the transfer concerning which Mr. Reed has testified.

Q. (By Mr. Cullinan): Now, who were these three people, Mr. Reed? Who was Arthur D. Curtner?

A. He was one, or is one of the original members of the syndicate. Mr. Parkinson is also one of the original members of the syndicate, and Mr. Fitch was the partner of Mr. Curtner and Mr. Osen, who are both members of the syndicate.

The Court: That is received as Exhibit 6.

Mr. Marcussen: No objection, your Honor.

(The documents referred to were marked and received in evidence as Petitioner's Exhibit No. 6.)

[Petitioner's Exhibit No. 6 appears on pages 177 to 181.]

Q. (By Mr. Cullinan): And you procured these men to take the Scoble interests over, did you not?

A. That is correct.

Mr. Cullinan: Now I offer in evidence, if the Court please, as Petitioner's Exhibit next in order, the two letters, one from the San Jose Hardware Company to Clayton & Company, and the other from W. L. Holmes to Clayton & Company, which I have already described.

Mr. Marcussen (Examining documents): No objection, your Honor. [76]

The Court: Received in evidence as Exhibit 7.

(Testimony of Frazier O. Reed.)

(The documents referred to were marked and received in evidence as Petitioner's Exhibit No. 7.)

[Petitioner's Exhibit No. 7 appears on pages 181 to 182.]

Q. (By Mr. Cullinan): You have told the story of that transaction, have you not? A. Yes.

Q. Yes. Now, then, I have a group of papers here dealing with the Shillingsburg and Hapgood transaction. What was that transaction?

A. We issued a receipt to Mr. Shillingsburg when he paid his \$50,000, and he signed the agreement, and it seems that he told Mr. Hapgood—

Mr. Marcussen (Interposing): If your Honor please, I object to hearsay of this type. He isn't qualified to state what one person told to another.

The Court: Well, Mr. Marcussen, I think, perhaps, these objections that you are making are technically correct, but it is very much like the objection of immateriality. I am going to overrule your objections. If the witness and if counsel for petitioner go too far afield you can move to strike, but I think that it is necessary to have the witness give us the story relating to these transactions. The petitioner should not be required in a case of this kind, I don't believe, to call in twenty or thirty witnesses merely [77] to overcome the objections of the kind that you are making.

Now, you made the objection before, and I want to get finished with the series of exhibits that peti-

(Testimony of Frazier O. Reed.)

tioner is offering. The fact is that transfers of interests were made. That is the material fact. Now, I am well acquainted with this type of case, and so are you, and the matter that you are objecting to really isn't very important. Now, your objection is overruled, and I am going to overrule the objections of that type right along. You can note your exceptions, if you wish to, and if the witness goes too far afield, then you can ask to have his answer stricken, and make any other argument that you want, but I think you will save time if you don't make that objection continuously.

Mr. Marcussen: Well, I don't want to impair or hinder the progress of the hearing, if your Honor please; but I do feel that if any of this testimony is material, then counsel should have brought the witnesses to testify, even if it involves thirty witnesses. I think it is that important.

The Court: Well, we will see how this shapes up, and you can probably do quite a bit on cross-examination for one thing, and you can also make any argument you want in your brief about the weight to be given the testimony of this witness. Under the circumstances, I think that is better for this witness to testify, and that these technical [78] objections should not be made right along. If you want to renew your objection each time, all right; but I don't want to discuss it any more.

Mr. Marcussen: Well, then, let the record show. if your Honor please, that, in order to expedite the trial, I will make now a blanket objection to all this

(Testimony of Frazier O. Reed.)

sort of testimony, and I won't repeat it from time to time, but I may make further motions from time to time to strike any of the testimony.

The Court: Will you read the last question, please.

(The pending question and partial answer were read by the reporter, as follows:)

“Question: Yes. Now, then, I have a group of papers here dealing with the Shillingsburg and Hapgood transaction. What was that transaction?

“Answer: We issued a receipt to Mr. Shillingsburg when he paid his \$50,000, and he signed the agreement, and it seems that he told Mr. Hapgood——”

The Court: All right, will you continue then, Mr. Reed?

A. (Continuing): ——who was associated as assistant to Mr. Shillingsburg, that he would let him participate to the extent of one-fifth of Mr. Shillingsburg's interest in the undivided fourteenth interest in the syndicate. [79]

Q. (By Mr. Cullinan): Let me interrupt here. How did you get that information?

A. Subsequently revealed. Mr. Shillingsburg was the agent for the Southern Pacific in San Jose, and Mr. Hapgood was his assistant. And he just wanted Mr. Hapgood to participate. We refused to recognize Mr. Hapgood and, in fact, insisted upon paying distributions from that ac-

(Testimony of Frazier O. Reed.)

count to Mr. Shillingsburg and not to Mr. Shillingsburg and Mr. Hapgood. And when Mr. Shillingsburg became quite ill and he was getting his affairs in shape, we yielded and then accounted to Mr. Hapgood for one-fifth of one-fourteenth, and to the Shillingsburg family for the remaining four-fifths of one-fourteenth.

Q. With respect to this or any of the transactions evidencing alterations in the ownership, do you know whether—I will withdraw that.

Relating back to the Scoble transaction, did Mr. Scoble received more or less than \$50,000 for the transfer of the interest?

A. The amount he received is set forth in the assignments themselves. He received slightly more. The amounts are in the transfer to each of the new parties.

Mr. Cullinan: Now, if the Court please, in connection with the Shillingsburg's transaction concerning which the witness has just testified, we offer first a letter addressed [80] to James A. Clayton & Company, signed by Mr. Shillingsburg, dated July 5, 1931, in which he says, without reading the whole thing: "Your records will show that for a one-fourteenth interest I pay to you \$40,000, and Mr. A. A. Hapgood \$10,000, and your disbursements have been on that basis. This is to instruct and request and urge that you change your account so as to show that Mr. Hapgood had one-fifth of one-fourteenth interest in the syndicate, and that you make further disbursements in accordance."

(Testimony of Frazier O. Reed.)

The Court: That should be offered separately, I believe.

Mr. Cullinan: Yes.

Mr. Marcussen: May I see that?

(Mr. Cullinan handed the document to Mr. Marcussen.)

Mr. Marcussen (Examining document): No objection.

The Court: It is received in evidence as Exhibit 8.

(The letter referred to was marked and received in evidence as Petitioner's Exhibit No. 8.)

[Petitioner's Exhibit No. 8 appears on pages 182 to 183.]

Mr. Cullinan: I am not, of course, reading these whole letters.

Then we offer in evidence a letter on the letter-head of Southern Pacific Company, dated August 14, 1931, addressed to Mr. Frazier O. Reed, President of James A. Clayton & Company, and signed A. A. Hapgood, and dealing with the same transaction. We offer that in evidence as [81] Petitioner's Exhibit next in order.

The Court: Received as Exhibit 9.

Mr. Marcussen: No objection.

(The letter referred to was marked and received in evidence as Petitioner's Exhibit No. 9.)

[Petitioner's Exhibit No. 9 appears on page 184.]

(Testimony of Frazier O. Reed.)

Mr. Cullinan: And finally we offer in this connection a document signed "E. Shillingsburg," dated May 28, 1926, reciting a consideration of \$10,000 as paid by Hapgood, bearing a postscript: "I hereby ratify, approve and confirm the foregoing sale and agreement," signed by "Nellie Shillingsburg," and underneath that another postscript saying: "I hereby agree to comply with all terms and conditions in the receipt," et cetera, signed by A. A. Hapgood. Attached to the sheet containing those is a copy of the original receipt of March 10, 1926, issued to E. Shillingsburg, and attached to that is another sheet signed by E. Shillingsburg, addressed to Clayton & Company, saying that "Clayton & Company is hereby requested to take notice that I have on this 26th day of May, 1926, sold, assigned and set over unto A. A. Hapgood an undivided one-fifth of all my right, title and interest to the receipt and agreement for \$50,000—" et cetera.

And we ask that that be offered as Petitioner's exhibit next in order.

The Court: Without objection, that is received as Exhibit 10. [82]

(The letter referred to was marked and received in evidence as Petitioner's Exhibit No. 10.)

[Petitioner's Exhibit No. 10 appears on pages 185 to 186.]

(Testimony of Frazier O. Reed.)

Q. (By Mr. Cullinan): Now, were there any other transfers other than by decrees of distribution of interests of the original investors in the syndicate?

A. Have you put in all the photostatic copies?

Q. I put in all the photostatic copies that I received from counsel which, I believe, are all the photostatic copies that we delivered to him, except one which doesn't appear to be significant now, and that is the Baldwin original receipt.

A. Oh. Yes.

Q. And the stipulation is that that receipt was in the same form as the Dorance receipt, which was introduced.

A. There were no other transfers.

Q. Now, did the investors in this syndicate, joint venture, as we call it, or agency arrangement, did they ever adopt a name? A. No.

Q. Did they ever have any meeting as such?

A. No.

Q. Did any group of them ever have meetings?

A. The only meetings I recall was one held when the Income Tax Department in 1930 sought to have a price, or a cost price fixed on each acre. At that time I got together [83] as many as were handy and discussed the matter to ascertain what we should do. Then when we received a notice in 1943 that the Income Tax Department was again asking that changes be made I called as many as I could get together, but there was never a meeting

(Testimony of Frazier O. Reed.)

at which all of the members of the syndicate were present. Those are the only two meetings I recall.

Q. And those were called for that specific purpose? A. And for no other.

Q. And was anything else discussed at those meetings respecting the management of the syndicate, or sales or prospects?

A. They were called solely to discuss the income matters. They may have all made some—asked some questions with regard to when they expected us to sell the balance of the land.

Q. Yes. Did you from time to time discuss the affairs of the syndicate with individual investors?

A. As we would meet I would talk with them, sometimes at the bank, sometimes hospital meetings, sometimes at even social events. You can understand that whenever a customer asks an agent a question that he is bound to reply. So over that many years I discussed matters with the members as we met, or as they asked me questions.

The Court: Of course, in part of your answer you [84] said whenever a customer discussed a matter with an agent he is bound to reply. Now, it will be understood that the witness' answers in so far as they involve conclusions relating to the issue in this case won't be binding on the Court.

Mr. Cullinan: That is so understood, of course.

The Court: Yes.

Q. (By Mr. Cullinan): I take it from your testimony that the investors never had an executive

(Testimony of Frazier O. Reed.)

or other committee appointed to deal with Clayton & Company in connection with this matter?

A. None.

Q. Do you know whether they ever took a vote, either at a meeting or otherwise on any question connected with the syndicate?

A. I do not recall any. I told you the only two meetings I recall was in connection with income tax matters.

Q. Well, I mean other than at meetings? For example, did they ever take a postal vote or a vote by letter? A. No.

Q. Did they ever interfere in any measure with the control of the operation of the syndicate by Clayton & Company, any one of them?

A. No.

Q. Or attempt to do so? [S5] A. No.

Q. Were any documents or accounts kept by the syndicate? A. You mean as a syndicate?

Q. As a syndicate? A. No.

Q. Did they have any office, the syndicate?

A. No.

Q. As such, except Clayton & Company, of course?

A. They were always welcome at our office, but they had no office.

Q. Were there any files to the syndicate other than Clayton & Company's own business files?

A. No.

Mr. Cullinan: Now, I think you have one of these photostats, haven't you, Mr. Marcussen?

Mr. Marcussen: Yes, I do.

(Testimony of Frazier O. Reed.)

Q. (By Mr. Cullinan): I show you a photostat of a page evidently of account. The page is designated as 684 (and I am saying this only for identification) and headed "M. E. Thomas—Miller & Lux," and I will ask you to tell the Court what that is.

A. (Examining document) This is a copy of Page numbered 684 in Clayton & Company's ledger of a thousand bound pages, and it is the beginning of the syndicate account.

Q. That is the first page in Clayton & Company's ledger [86] dealing with the account of Clayton & Company with the syndicate, is it not?

A. That is right.

Q. Were all similar pages of the account throughout the years in identical form?

A. Exactly, except with regard to items and amounts.

Q. Yes. But I mean the form was the same?

A. Exactly.

Mr. Cullinan: We have an understanding with counsel, if the Court please, that it will be sufficient if we offer this photostat of the first page with the statement that it is typical of all the other pages. Counsel has been offered an opportunity to inspect the books, but since they are down in San Jose he is taking our word for that, and we give it. We have the assurance of Mr. Reed and his testimony, that all the other pages are identical, and we are introducing this to show the form in which the account was kept.

(Testimony of Frazier O. Reed.)

Mr. Marcussen: That is correct, if your Honor pleases. No objection.

Mr. Cullinan: Counsel already has copies.

Mr. Marcussen: By the way, I don't have them right now. I had them on this table. I wonder if those——

Mr. Cullinan (Interposing): I will be glad to give you one. We have a number of these (handing document). [87]

Mr. Marcussen: Thank you.

Mr. Cushing: Those are different pages.

Mr. Cullinan: Excuse me. I am stupid. Maybe I should make the offer in this form, and offer it all as one exhibit: Photostats of pages designated 684 to 691.

Q. (By Mr. Cullinan): Now, these cover the account for the whole year 1926, do they not?

A. (Examining documents) It goes to August 31, 1926.

Mr. Cullinan: Only to August, that is correct. So instead of offering the one page we will offer them all together as typical pages, and the testimony of the witness is that all subsequent pages were the same. I thought these were all one.

The Court: Without objection, the group of pages will be received as one exhibit, Exhibit 11. Let's see how many pages are there, Mr. Kassel.

The Clerk: Eight.

Mr. Cullinan: There are eight sheets.

The Court: Exhibit 11 consists of eight sheets. They are photostat copies of accounts.

(Testimony of Frazier O. Reed.)

Mr. Marcussen: No objection.

(The documents referred to were marked and received in evidence as Petitioner's Exhibit No. 11.) [88]

Q. (By Mr. Cullinan): Now, let me clarify this point: Those pages are headed "M. E. Thomas—Miller & Lux."

Are they the accounts of the Bloomfield Ranch?

A. That is correct.

Q. Why were your returns entitled the returns of the Bloomfield Ranch, whereas, the accounts were the accounts of M. E. Thomas—Miller & Lux?

A. Well, when we started the account on January 27, 1926, the bookkeeper, who made the entry, to distinguish the account, wrote the words "Miller & Lux" after the name of "M. E. Thomas."

We began advertising for sale the former lands of Miller & Lux, and Miller & Lux, who then owned probably a million acres of California and Nevada and Oregon, asked if we would refrain from using the name of Miller & Lux in our advertising, and we very gladly accommodated them because they were then and still are a going concern known as Miller & Lux, and we did not purchase the name or any part of it. We simply purchased the 27,500 acres of land from them. So when the time rolled around to file the partnership return for 1926, which was sometime in 1927, we had discontinued using the name of Miller & Lux, and thereafter we called it Bloomfield because that was the name

(Testimony of Frazier O. Reed.)

by which Mr. Henry Miller, who founded that great corporation, like to have that particular ranch called, ranch operation. You see, the lands extended into [89] three Counties there, and he went there as a butcher boy in 1854 and accumulated all those holdings. He was proud of them, and today even whenever you are going south of Gilroy you are going toward Bloomfield.

Q. Yes.

A. And I suspect the name will continue forever.

Q. In what respect, if any, did the account, typical pages which have just been introduced, the account of M. E. Thomas and Miller & Lux differ from the accounts of Clayton & Company kept with other clients? A. None.

Q. Now, is it a fact that the sole account, record of accounts of the Bloomfield Ranch syndicate was kept in the form of this Exhibit No. 9—is it?

The Clerk: 11.

Q. (By Mr. Cullinan) (Continuing): —11, and that there were no other records of the transactions of the Bloomfield syndicate kept by anybody?

A. That is correct, and that goes through several Clayton & Company ledgers because the ledger from which these pages were taken only lasts two or three years. We have to bring in a new one. So it runs through several ledgers, but identical always; no other record; just a debit and credit entry. Any money that we receive for that account

(Testimony of Frazier O. Reed.)

we credit to the account; any money that is paid out is charged to that account, and that is the only record we have ever had.

Q. It really is a cash account with receipts on one side and disbursements on the other?

A. That is correct, purely an agency account such as for any other customer.

Q. Now, Mr. Reed, it has been stipulated that Miller & Lux employed about 200 men on the property at the time when the Bloomfield Ranch was acquired in the name of M. E. Thomas. What staff did Clayton & Company maintain on those properties after the acquisition in March of 1926?

A. Mr. Frank Rice, who was Superintendent for Miller & Lux at Gilroy for many years, told me that they often employed as many as 200 men. We did not intend to operate it when we took over for the syndicate, and we, therefore, only kept one man, a Mr. Fitzgerald, who was acquainted with the locations of the various water pipe lines. The Miller & Lux concern had been handling, oh, several thousand head of cattle every year upon those ranches, and the operation had grown along with Mr. Miller's operations, and there were pipes scattered everywhere, underground pipes from springs, from wells, and from reservoirs, and we did not know and would not have known the locations of these for a long, long time if we had not taken over Mr. Fitzgerald. [91]

Q. And you paid him how much?

A. I think \$75 or \$80 a month.

(Testimony of Frazier O. Reed.)

Q. What other staff did Clayton and Company maintain in addition to Mr. Fitzgerald, if any?

A. Only Clayton & Company's staff; no staff at Bloomfield.

Q. Well, you don't mean that you employed extra help on account of the operation or maintenance of this ranch, do you? A. No.

Mr. Marcussen: I object to that as a leading question.

Mr. Cullinan: It is leading.

The Court: Objection overruled.

A. No; we went along in stride.

Q. (By Mr. Cullinan): Now, the stipulation accordingly shows that you undertook immediately a sales campaign, and the stipulation recites (I will not go into it now) the amounts of sale of each year to and including 1940.

When the land was acquired by Clayton & Company for the syndicate were any parts of it subject to lease? A. Yes.

Q. To what extent, just generally?

A. In 1926 we received \$34,041 from rents. [92]

Q. And those were of leases already existing, made by Miller & Lux prior to the sale to you, is that correct? A. That is right.

Q. The stipulation shows that Miller & Lux ran some thousands of cattle on the ranch. Did you—and by “you” I mean Clayton & Company or the syndicate, or you operating for the syndicate—did you run any cattle on the land at all?

A. Never at any time.

(Testimony of Frazier O. Reed.)

Q. Pending the making of sales was it necessary to do any farming or tilling or cultivating of the land? A. Yes.

Q. And why?

A. To keep the land clean because land in Santa Clara Valley, if you neglect it, will rapidly go native, and greasewood and weeds and brush, poison oak will all return.

Q. And did you cultivate the land, the unsold land while waiting for sales?

A. Yes, we did. And there is another reason there. We had \$30,000 worth of taxes to pay the first year.

Q. Did you rent any of the lands while awaiting sale? A. Yes.

Q. For what periods of time?

A. Prior to the depression for one year only. After the depression we violated the agreement and—— [93]

Q. (Interposing): My question now is confined to the period prior to the depression. I will come to the other later.

A. We did not rent any land prior to the depression for longer than one year.

Mr. Marcussen: May I ask what depression?

Mr. Cullinan: What?

Mr. Marcussen: May I ask which depression you are referring to?

The Witness: The one that followed the crash in 1929.

(Testimony of Frazier O. Reed.)

Mr. Cullinan: That is like asking the San Franciscan what earthquake he refers to. There may be several, but we talk of only one.

The Court: I would like to ask the witness a question there.

When you say you rented some of the lands for a year, do you mean by that that when you rented it you limited the length of the lease to one year?

The Witness: That is correct, usually from November 1 of this year to October 31 of next year, so that we would—the cropping seasons are—that is a usual cropping season.

The Court: And then you could renew that lease from year to year if you wanted to? [94]

The Witness: Yes.

Mr. Cullinan: And if the lands were not sold.

The Court: Yes. Did you renew some of those leases from year to year?

The Witness: Yes. The beginning leases I can't recall because we sold 25,000 acres in the first five years. We were moving tenants around at a rapid rate.

Q. (By Mr. Cullinan): What changes in the farming done on the land were made by Clayton & Company, if any, in the years from 1926 to, say, 1931, when the depression became felt, as the stipulation shows?

A. Well, when the price of wheat receded below the level which prevailed at the time of Shakespeare we discontinued growing wheat, as most every other farmer throughout the United States

(Testimony of Frazier O. Reed.)

did, and barley also, and then we went into truck farming, which accounts for the development of the wells.

Q. And what did you have to do in order to convert the farming operations that you were doing from wheat and barley to truck farming?

A. Well, we had to improve many of the wells that were on the property when it was purchased. We also installed new wells.

Q. Well, is irrigation necessary for wheat and barley [95] farming in that country?

A. No.

Q. Is it necessary for these other crops?

A. Yes.

Q. And can any other crops be raised by dry farming in the territory covered by Bloomfield Ranch? A. No, not profitably.

Q. Not profitably, of course? A. No, no.

Q. Now, then, it has been stipulated that the effects of the depression so far as the Bloomfield Ranch was concerned, took effect seriously in 1931.

A. That is revealed by——

Q. (Interposing): Yes. This is just part of my question. A. Oh!

Q. What, if any changes in the methods of farming the property were made after 1931?

A. None.

Q. None, except those to which you have testified?

A. The changes that were made after the crash of 1929, and when the prices of agricultural prop-

(Testimony of Frazier O. Reed.)

erties went so low in 1930 we improved the wells, as I stated, and put in other wells, and then continued that on a larger scale when we couldn't find purchasers for the remaining lands. We had [96] the remnants left after 1930.

Q. Now, how many acres did you have after 1940, approximately? A. After 1940?

Q. After 1940? No, I mean after 1931?

A. About—I have it here.

Q. The stipulation shows.

A. (Examining document): We made 15 sales in 1930 and sold 1702 acres. That left us with 2605 acres. I have left off the fractions there at the start of 1931.

Q. So from 1931 on——

A. That is less than 10 per cent of it.

Q. Yes.

A. Of the entire area that was purchased.

Q. And what you have testified to concerning farming operations subsequent to the depression relates only to those 2600 acres, does it not?

A. That is right.

Q. After the depression took effect what, if any, efforts were made to continue sales of the land?

A. We found it useless because no one had any courage, no confidence in the future. In 1932, to illustrate, we formed another syndicate and purchased 650 acres of full bearing apricot orchards at Brentwood in this State, which is a splendid apricot producing section, and we bought it [97] for \$100 an acre.

(Testimony of Frazier O. Reed.)

Mr. Cushing: That is a different thing.

Q. (By Mr. Cullinan): That is a different thing altogether.

A. I understand, but that goes to show how impossible it was to sell the remnants at Bloomfield after 1930.

Q. Exactly! But was there at any time, so far as you and the investors were concerned, any deviation from the original plan to sell the land as soon as possible at a profit?

A. No, none, because the syndicate was formed for the purpose of purchasing the land and selling it as soon as possible. The farming which was done was only incidental. It was done to pay taxes and to pay interest in the beginning.

Q. Was it done also to keep the land salable?

A. To keep it in condition to sell, and we did a splendid job, because to sell 25,000 acres in five years out of 27,500 acres is a good job in anybody's district. It is a record.

Q. Now, was any money of the syndicate ever invested in any other land or any other activity of any kind?

A. Not a penny.

Q. Were any exchanges of property ever made of Bloomfield lands for any other lands?

A. No. [98]

Q. No other lands were ever taken in to the syndicate in any fashion?

A. That is correct.

Q. When distributions—well, let me first ask generally, and I will produce some tables after-

(Testimony of Frazier O. Reed.)

wards. But from time to time distributions were made to the investors, were they not, as money came in? A. That is correct.

Q. Was any distinction made in those distributions between capital returned and profits distributed?

A. Not upon the books of account. I don't recall any others. Whenever we had money on hand that we felt it was all right to return to the syndicate members we returned it.

Q. Was or was not the capital of the investors gradually returned right from the beginning?

A. We began distributing in 1928.

Q. Well, the account shows that?

A. Yes, sir, and continued right through the years. The last distribution was in 1944.

Q. Well, now, the stipulation shows that to and including 1940 some 224,889 acres had been sold for \$1,474,233. What was done with that \$1,474,233?

A. The first thing which was done was the repayment to the Bank of Italy of the \$335,000 which was borrowed from the Bank of Italy. Then we paid the \$250,000 which was [99] borrowed from Miller & Lux. In other words, I think in 1926 and 1927 from sales we paid off \$585,000 of principal, plus the interest.

Q. And the rest went to the investors, did it?

A. That is correct.

Q. I suppose you kept on hand some small amounts at all times?

(Testimony of Frazier O. Reed.)

A. Oh, the amounts have varied as revealed by this first account. One shows a credit of \$514,000, another balance at the end of the month showed a credit of \$56,000. At the end of April there was a credit of \$92,000, at the end of May, '26, \$15,444, and that is typical of the account from its inception to the present day.

Mr. Cullinan: Now, if the Court please, we have boiled down and submitted to counsel—they are willing to stipulate to what we produce now.

Q. (By Mr. Cullinan): I show you a sheet entitled on one side "Statement of Gross and Net Income from Farming and Rents, 1926 to 1940, inclusive, as shown by Bloomfield Ranch Partnership Returns of Income," and on the right hand side "Statement of Interest Received, Profits from Sale of Real Estate, Miscellaneous Items and Total Gross Income as shown by Bloomfield Ranch Partnership Returns of Income."

And I may state, if the Court please, that we have [100] compiled this in our office from our copies of the returns filed for all those years, and I would like to offer it in evidence with the consent of counsel as our Exhibit No.—

The Clerk: 12.

Mr. Cullinan: 12.

Mr. Marcussen: No objection.

Mr. Cullinan: And then I would like to tell the Court what it is, at least submit it to the Court for inspection.

The Court: Received in evidence.

(Testimony of Frazier O. Reed.)

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 12.)

[Petitioner's Exhibit No. 12 appears on pages 187 to 189.]

Mr. Cullinan: That, if the Court please, is what it purports to be. It shows all the receipts from rents, and all the receipts, mostly losses they were, from actual operations; the taxes paid, the receipts from sales, the receipts from interest (I have to ask the witness about that in a moment), from unpaid balances of sales, and the totals. And it shows, according to our theory, the net profits gained from sales in the course of those years, and the net profits gained from rents and operations.

Q. (By Mr. Cullinan): You are familiar with this, are you not, Mr. Reed? You have seen it?

A. Yes, sir. [101]

Q. There is an item here, which Mr. Marcussen and I have designated as column "C", of interest, showing a total of \$156,402.85 interest. What is that item? What interest is that?

A. That is interest received?

Q. From whom?

A. I say is that interest received?

Q. Interest received, yes. I will show it to you.

A. Well, in 1926 we received \$10,141.84.

Q. I am not asking you for the details. They all appear on this sheet. I am just asking you whether that is interest paid out or interest taken in?

(Testimony of Frazier O. Reed.)

A. Interest received, primarily from sales, unpaid balances on sales of real estate.

Q. You sold a good deal of the land on installments, did you not?

A. One-quarter cash, the balance deferred, and in those days we were getting interest at 7 per cent.

Q. Column "D" of this exhibit is a column entitled "Profits from Sale of Real Estate."

If counsel will permit me to lead the witness, because counsel and I have discussed this—that represents profit on sales of real estate computed according to the formula on which the syndicate and the Commissioner agreed in 1930, in other words, a division of 55.99 cost and 44.01 profit?

A. Correct.

Mr. Marcussen: In other words, that is the profit over the base that was agreed upon.

Mr. Cullinan: Yes. This is all taken from the returns, and that is the profit reported in the returns, and on that basis.

The Court: We will recess for lunch until 2:15 o'clock.

(Whereupon, at 1:45 p.m., a recess was taken until 2:15 p.m. of the same day.) [103]

Afternoon Session, 2:15 P.M.

The Court: We will now resume the hearing of the Bloomfield Ranch case.

Mr. Cullinan: Mr. Reed.

The Court: Mr. Reed, will you take the stand again?

Whereupon,

FRAZIER O. REED

resumed his testimony as follows:

Direct Examination

(Resumed)

By Mr. Cullinan:

Q. Mr. Reed, a question or two about Petitioner's Exhibit No. 12.

I observe that the farming operations through the years from 1926 to 1940, inclusive, were conducted at a loss, but that the renting operations were conducted at a profit.

Can you account for that?

A. I think to satisfy the Department that the expenses were charged against farming instead of against rents and they were not apportioned because it was not material, and not material now. If we had broken down the income from rents and set against it a portion of the cost of operations, it would have reduced the amount charged against the farming, but for taxation purposes it was unimportant. And I suspect that Mr. Curry and Mrs. Curry included them in the [104] income tax returns in that manner at the suggestion of the Examiners for the Income Tax Department.

Mr. Marcussen: I object to that, your Honor, as being entirely incompetent, and I think it should be stricken.

The Court: Objection overruled.

Q. (By Mr. Cullinan): Now, you said some-

(Testimony of Frazier O. Reed.)

thing about having to construct wells when you switched from dry farming to truck farming.

How many wells did Clayton & Company as operator build all together, if you know?

A. I don't know, but I think the statements that it was necessary to prepare a reply to some of Mr. Marcussen's inquiries before we came here reveals all of that. And you see none of these statements were put together, these figures were never put together until this income tax matter arose. And what I am looking at now is the result of questions that either Mr. Cullinan or Mr. Cushing or Mr. Marcussen asked.

Q. Well, to make it clear on the record, you have supplied Mr. Marcussen with a duplicate of that large yellow sheet that you hold in your hand, and that contains detailed information about farming, expenditures on the ranch in connection with operations for the whole period, does it not?

A. I didn't have that one in my hand, Mr. Cullinan. [105]

Q. Oh. A. Let me find this one here.

Q. Well, that is what you are referring to?

A. Yes, sir.

Q. I have a copy here.

A. This is the one from which that was made (indicating). Not all of these items that are shown on that statement which Mr. Marcussen has and which you apparently are getting out as wells means a new well. For instance——

(Testimony of Frazier O. Reed.)

Q. (Interposing): Well, let me interrupt. Mr. Marcussen will go into such detail as he wants. I am just asking a general question so as to lay the foundation for such cross-examination Mr. Marcussen wishes on the subject.

If you can't tell me how many new wells were built, can you tell me how much was spent on the construction of the wells?

A. No; it is all here together.

Q. What?

A. It is all here together. We have never separated it.

Q. Oh, you have not segregated it?

A. No. In other words, this sheet that you have there, Mr. Marcussen has, and I have here, represents all of the money spent over the 19 years for the items that are listed in the column on the left-hand side. [106]

Q. I see. A. That is a total figure.

Q. In other words, the number could be worked out? A. Yes, sir.

Q. But you haven't worked it out?

A. No.

Mr. Marcussen: Well, I might ask, if it is appropriate, my understanding with Mr. Reed and with Mr. Cullinan, as I recall, was that information would be supplied, the amount of the new investment put in by the operator since 1926.

And you state that that can be supplied, Mr. Reed?

(Testimony of Frazier O. Reed.)

The Witness: I think I can supply it from here, if you want to take the time.

Mr. Cullinan: You mean new investment? You don't mean new money?

Mr. Marcussen: No, I mean the new wells installed by Clayton & Company.

Mr. Cullinan: They are all on this yellow sheet.

The Witness: They are all here, everything, wells that have been improved, wells that have been repaired or replaced, or new wells built, are all on this sheet; everything.

Mr. Cullinan: We are not so much interested in that as the government is. We supplied the information. We [167] will supply anything further if we haven't supplied enough.

By Mr. Cullinan:

Q. Now, I show you a tabulation entitled "Investment and Sales," and ask you what this is, if you know?

Mr. Marcussen has seen a copy of it.

Maybe I can make an explanation, if the Court please, which will be acceptable to Mr. Marcussen.

This tabulation shows—the first part of it is material taken from the stipulation of facts, sales to and including 1940, \$1,474,243, and the source of the money, which has already been testified to, showing that the money expended in the purchase was \$1,285,000, and showing therefore a gain to and including 1940 or \$189,243.06, and then showing the amount of sales in each year subsequent to 1940. And this is the new material and it was supplied

(Testimony of Frazier O. Reed.)

by Mr. Reed: In 1941, in 1942, in 1943, and in 1944, which, added to the \$189,243.06, shows a total gain, that is, a total difference between the purchase price and the sales up to and including 1944 of \$541,843.06, and we added, after request of Mr. Marcussen, an item showing that one-fourteenth of that amount is \$38,703.07.

In other words, that is the gain on sales alone, and without including interest or rentals coming to each investor who put up \$50,000.

And I ask that that be admitted in evidence. [108]

Mr. Marcussen: No objection.

Mr. Cullinan: As Petitioner's Exhibit No. 13.

The Witness: I think I can see an error——

Mr. Cullinan: (Interposing): Wait a minute until we get this. I will ask you some questions about it then. This goes in by stipulation.

The Court: The schedule is received in evidence as Petitioner's Exhibit 13.

(The schedule referred to was marked and received in evidence as Petitioner's Exhibit No. 13.)

[Petitioner's Exhibit No. 13 appears on page 189.]

By Mr. Cullinan:

Q. Now, Mr. Reed, I will give you another copy of that so you can have it before you.

That would show gains based upon merely the difference between the monies paid for the land and the monies received from the land and regardless of

(Testimony of Frazier O. Reed.)

that arbitrary allocation as between cost and profit which you made and followed consistently throughout the returns; that is correct, is it not?

A. Check.

Mr. Cushing: Did he answer that?

Mr. Cullinan: You did answer that?

The Witness: Yes.

Q. (By Mr. Cullinan): That schedule shows that there were 1500 acres [109] remaining unsold. What is the value of those 1500 acres remaining unsold?

Well, first—withdraw that.

Will you describe the character of those 1500 acres, what sort of land they are?

A. Well, we have some very good land, we also have some worthless land. I broke those down here somewhere if I can find it, and this would be more accurate than my memory would be if I could find them.

You show on this statement about 1500 acres remaining to be sold, and my calculation from the Clayton & Company books reveals 1510.8491. I have carried it all the way out. Of that there are about 64 acres of tules, about 20 acres in the Llagas Creek, which is willows and creek bottom, a total of about 100 acres of swamp land, land that is very wet; some peat land, some of it is quite boggy. There are about 25 acres in the Uvas Creek, and that is comparable to the land that is in the Llagas-Creek, and there are about 240 acres in the bottom of the San Benito River, which is a sand river, dry

(Testimony of Frazier O. Reed.)

in the summer, and the only thing it grows is willows. It has no value at all. So of the 1510 acres remaining, about 449 acres are tules, creek bottom, swamp and river bottom.

Is that what you wanted?

Q. Yes. Now, what is the value of those remaining [110] 1500 acres?

A. Well, we had hoped to sell them for between two and three hundred thousand dollars. We sold three hundred and eighteen thousand dollars worth in 1944, but when we did that we topped the remaining lands, in other words, we sold the better of about 2200 acres.

Q. Well, what do you think you can sell these remaining 1500 acres for?

Mr. Marcussen: I object to that, your Honor, as being entirely immaterial.

The Court: Objection sustained.

A. Well, I——

The Court: (Interposing): The objection was sustained. That means you can't answer the question.

Q. (By Mr. Cullinan): I will now go back to the first form of my question, which I don't think, if I recall, was directly answered.

What is the value of the 1500 acres remaining?

A. Between two hundred and three hundred thousand dollars.

Mr. Cullinan: If the Court please, I have a map of the Bloomfield syndicate properties which it might be well to put in evidence for the information of the Court.

(Testimony of Frazier O. Reed.)

It shows the properties cut off into ranches by numbers, the acreage, the total acreage, and this is entitled [111] "Bloomfield Syndicate Map, showing the 21 ranches, comprising approximately 27,430 acres in Santa Clara, San Benito and Santa Cruz Counties, California, acquired by the Bloomfield Syndicate from Miller & Lux, Incorporated, in 1926."

It is dated "February, 1945. S. A. Herrmann, H-e-r-r-m-a-n-n, C. E."

Q. Was this map made under your direction?

A. Yes, sir.

Q. By Mr. Herrmann? A. Yes, sir.

Q. He is an old——

Mr. Marcussen: (Interposing): I have no objection to the introduction of that.

Mr. Cullinan: Well, then, we offer that.

The Court: It is received in evidence as Exhibit 14.

(The map referred to was marked and received in evidence as Petitioner's Exhibit No. 14.)

Q. (By Mr. Cullinan): I call your attention, Mr. Reed, to the statement on that map "Only Parcels Nos. 1 and 14, and a portion of Parcels Nos. 10 and 15 have been subdivided. The subdivided portions represent less than 6 per cent of the total area of the 21 ranches."

Is that statement correct? [112]

A. That is correct.

(Testimony of Frazier O. Reed.)

Q. As you sold the property off, how did you measure out the parts that you sold to the different buyers?

A. We surveyed all of the lands sold, and we did not have enough small——

Q. (Interposing) You are not answering my question.

My question is: Respecting the larger portions, did you have any subdivision map for the larger portions?

A. Oh, No. We sold those by *leaps* and bounds, surveyors' descriptions.

Q. A buyer would pick out what he wanted and then he would have it surveyed and sell it to him?

A. That is right.

Q. Now, you started to testify concerning some smaller portions.

A part of the Bloomfield acreage was actually within the town of Gilroy, was it not?

A. That is right.

Q. And had that been subdivided, a subdivision map of that been made prior to the acquisition of the land by your syndicate?

A. Yes. Miller & Lux subdivided some of the land into city lots, and the syndicate acquired those lots along with everything else that Miller & Lux owned. In fact, in the deed from Miller & Lux to M. E. Thomas there is a so-called [113] catch-all, or dragnet clause that took in everything that had ever been reserved by Miller & Lux and was not disclosed by the record, or, I mean, by the title company's

(Testimony of Frazier O. Reed.)

report of the record. So we took those lots along with the other properties.

Q. And did you find it necessary to subdivide some additional acreage in the neighborhood of Gilroy?

A. In the City of Gilroy we subdivided a substantial portion of the property which was inside the City of Gilroy, and not wanting to sell lots we sold blocks. I think we subdivided about six blocks, and if anyone wanted a part of a block we said, "Well, go and find some one or two or three people that will take the balance of the block, and we will sell you a whole block, but we will not sell portions of a block."

We did that because we wanted to keep away from the smaller and disturbing sales.

Q. When you say that you subdivided, as I understand, you mean you had a subdivision map prepared?

A. That is right.

Q. And why did you do that? Was that required by the law?

A. Yes, required by the law, and also so that we would not be cluttering the records of the county up with a lot of meets and bounds descriptions inside of a city. [114]

Q. You didn't lay out any sidewalks or curbs, or anything like that, did you?

A. No, none at all.

Q. You didn't do any improvement work?

A. No, none at all. The city later graded the streets and oiled them, and I don't think anything

(Testimony of Frazier O. Reed.)

more than that has been done, except some of the people who bought those lots got together and put in their own curbs and gutters, but we didn't spend any money for that purpose, not a penny.

Q. You did nothing but make a map?

A. That is all, and filed it for record for the convenience of selling, or, rather, describing the property when it was sold.

Mr. Cullinan: I think that is all.

The Court: You may cross-examine the witness, Mr. Marcussen.

Cross-Examination

By Mr. Marcussen:

Q. I think you stated earlier in your testimony, Mr. Reed, that Clayton & Company was instrumental in organizing Bloomfield Ranch Syndicate, is that right, as you have called it?

A. Yes, sir.

Q. And in going about the organization I think you [115] also testified that you talked to a number of people that Clayton & Company had done business with in prior years, or on other occasions, and interested them in the purchase of the property; is that correct?

A. That is correct.

Q. And when was the actual purchase of the property consummated? Was that prior to the time the agreement was signed on March 10, 1926?

A. Yes, sir.

Q. That Clayton & Company had purchased the property then?

(Testimony of Frazier O. Reed.)

A. No. As I told you, I personally had paid for the syndicate to Miller & Lux \$50,000 on January 28, 1926, which, as I said this morning, was my birthday.

At that time, if you will refer to your photostatic copy of the books of account of Clayton & Company, you will find that a substantial portion of that money had been paid in, I mean by that had been received by Clayton & Company.

Q. In other words, the arrangements had already been made sometime prior to the actual date of the agreement, is that correct?

A. Yes. The agreement was an after-thought.

Q. Did you issue any written statement at all to these people showing them the outline of the plans for the purchase of this property? [116]

A. No, but I talked with them about it.

Q. You talked with each one individually?

A. Yes, sir, and told them what I thought we would be able to sell it for, and the profit that we would be able to make.

Q. Yes. Now, I think you referred to the fact sometime in the course of your testimony that there never were any meetings except the two meetings you referred to, but that you did meet the individuals from time to time.

They were people that you knew?

A. Yes.

Q. And from time to time you were questioned by them as to the status of the operation, and I

(Testimony of Frazier O. Reed.)

presume that you gave them the information in answer to those requests, is that correct?

A. I did.

Q. Under those circumstances it was hardly necessary to call any meetings, was it?

A. Oh, when I would talk with one out of fourteen it didn't mean that I would talk the same thing with the other twelve.

Q. Yes, I realize.

A. Clayton & Company being one.

Q. But from time to time you had occasion to meet the various investors in this enterprise and you did discuss [117] the status of affairs with them, is that correct?

A. Oh, yes, over 19 years I talked with them many times.

Q. I suppose their inquiries would be more or less along the same line, what the prospects for further remittances and dividends from the enterprise were, is that correct?

A. That is very well put, yes.

Q. Now, then, I think you also stated that it was never necessary, or that the investors themselves never met together and took any vote on any matters nor took any part in the management, is that correct?

A. That is correct. I said that this morning, and that is my recollection of it.

Q. Now, the agreement itself, however, as you understand it, vested in Clayton & Company as the

(Testimony of Frazier O. Reed.)

operator full discretion with respect to the management of the enterprise, is that correct?

A. Yes, sir.

Q. Now, I think from time to time in the course of your testimony it has been brought out that Bloomfield Ranch consisted of a partnership, in effect?

A. Yes.

Q. And at other times you have stated that there was an agency? [118]

Actually Clayton & Company was one of the original investors, was it not?

A. That is right.

Q. And actually invested \$50,000 in the enterprise?

A. That is right, and signed one of those syndicate agreements along with the other thirteen members.

Q. Yes. Well, then, the agreement provides that Clayton & Company shall be the operator, so in any event Clayton & Company was not merely an agent of the other investors in this enterprise, were they?

A. Well, the sale of the land was in Clayton & Company's hands as agent and odd, but Clayton & Company did actually employ itself as one of the owners to be its agent. Now, that was done, and I can't see any objection to it.

Q. Well, then, Clayton & Company also was credited with \$50,000 for consummating the whole arrangement and organizing the syndicate, as you have called it, is that correct?

A. That is right.

(Testimony of Frazier O. Reed.)

The Court: What do you mean by Clayton & Company was credited with \$50,000?

The Witness: Commission.

Mr. Cullinan: The agreement provided for a commission to Clayton & Company of \$50,000 for the purchase of the whole Bloomfield Ranch.

Mr. Marcussen: I don't see that referred to in the actual agreement itself, Mr. Cullinan. Can you place your finger on that?

Mr. Cushing: Yes, it is.

Mr. Cullinan: It is in there.

Mr. Marcussen: In the agreement?

Mr. Cullinan: Yes.

Mr. Marcussen: Oh, yes, yes, I beg your pardon. I overlooked that and was unable to find it a moment ago.

It is provided in the agreement, pages 3 and 4 of the copies submitted in evidence: "It is authorized, understood and agreed, however, that the operator has charge and is entitled to a commission of \$50,000 for the negotiation, purchase and consummation of sale of said properties from Miller & Lux, Inc."

Q. (By Mr. Marcussen): Then in addition to that I think the agreement also provides that Clayton & Company is also entitled to a commission upon the sale of the properties, on the resale of the properties, I should say; is that correct?

A. That is right, 5 per cent on the sale.

Q. Now, is there any reference in there to any commission for the rentals? A. No.

(Testimony of Frazier O. Reed.)

Q. No reference to it, but——

A. (Interposing) I don't recall any. You have the [120] agreement before you there.

Mr. Cullinan: There is not.

The Witness: I don't recall.

Q. (By Mr. Marcussen): I don't see any, but at any rate, the fact is Clayton & Company also received 5 per cent commission on all the rentals; is that correct?

A. Not at the beginning, but when the depression thrust upon us the responsibility of carrying on when there were no sales—when we intended to liquidate, and sell, and clean up, we did not charge commissions, but when the responsibility of carrying on during the depression when no land anywhere was selling—we just felt that it was unreasonable for the syndicate members to expect us to do the work for nothing. The fact remains it is unprofitable for a real estate agent to operate land.

Q. Well, I take it that none of the investors made any complaint about this at all to you charging the commission, is that correct?

A. No, none has ever raised any complaint about our charging, but I can——

Q. (Interposing) I presume you concluded that it was reasonably implied from the agreement that any rentals would be subject to the usual 5 per cent commission?

Mr. Cullinan: I object to that upon the ground it is speculative and calls for the conclusion of the witness.

(Testimony of Frazier O. Reed.)

Mr. Marcussen: If your Honor please, this is cross-examination.

Mr. Cullinan: Well, even so.

The Court: The objection is sustained.

You can ask him why he did it, or what his reason was, if you want to.

Q. (By Mr. Marcussen): Well, I will ask that question, if you will state in your own words, Mr. Reed, why the commission was charged?

The Court: He has stated why the commission is charged. Do you want to tie up with this agreement? I would suggest that you reframe the question.

Mr. Marcussen: Strike the question.

Q. (By Mr. Marcussen): Now, referring to Exhibit 12, which has been already introduced in evidence, I want to call your attention to the column here showing rents between columns A and B, entitled rather not "rents," but commissions, and ask you whether those are the commissions referred to?

Mr. Cullinan: What is the question, counsel? I didn't hear it.

Mr. Marcussen: I am asking him whether those are the commissions that we are talking about. [122]

Q. (By Mr. Marcussen): That is on the rental of the property, I presume, and those commissions were paid to Clayton & Company, is that correct?

A. I noticed here—my answer is "Yes," if you will permit me to explain it.

Q. Surely.

(Testimony of Frazier O. Reed.)

A. We collected—in 1926 we collected \$34,041 in rents, and we have here commissions on rents \$1327.60.

My statement with regard to commissions a minute ago was wrong because we did take it. But in 1927——

Q. (Interposing): You mean you did take commissions from the beginning in 1926?

A. That is right, but in 1927, why the commissions on rentals were omitted from this statement I don't know.

Q. Were there commissions in that year also?

A. Yes. The rentals, rents received in 1927 were \$4842; no commission charged on my statement here.

Q. And in 1933 and 1935 I note that Exhibit 12——

A. (Interposing) I think that thereafter commission was charged each year.

Q. Yes. And apparently that is an omission on this statement, is it not?

A. Whether our bookkeepers forgot to charge the commission—I can hardly believe that. It doesn't show [123] in this statement.

Q. While I have Exhibit 12 here there are a couple of more——

The Court: (Interposing) Must we spend so much time on this item of those little rents? Don't you think you have covered that enough?

Mr. Marcussen: Yes, I have covered that, your Honor.

While I have Exhibit 12 here, I just want to call

(Testimony of Frazier O. Reed.)

attention to the statement here with the asterisks. I notice here a statement, other items herein, that there are wo asterisks, and I think that counsel informed me that there were some slight inaccuracies and differences between those two amounts, and the amounts appearing on the returns.

Is that correct?

Mr. Cushing: Yes, that is correct.

Q. (By Mr. Marcussen): But they are entirely immaterial? A. Yes, sir.

Q. I just wanted to explain what that was. Then I wanted to ask you also about the total figure that you see here in the right hand column, Mr. Reed. Is that the total of columns A, B, C, D and E as marked there?

A. (Examining document) Yes.

Q. And with respect to column E, it is headed "Miscellaneous."

Will you state what that consists of?

Mr. Cullinan: I didn't want to stop this cross-examination and object to it, but I want to remind counsel that that tabulation is just a statement. It is taken off the income tax returns. It was not prepared by the witness or, in fact, in the witness' office.

Mr. Marcussen: Well, I understood that the witness would be familiar with these items. I asked counsel, if you recall, what that item was.

Mr. Cullinan: Well, I think he is reasonably familiar with them.

Q. (By Mr. Marcussen): If you know?

(Testimony of Frazier O. Reed.)

Mr. Cullinan: But those are figures taken from the income tax returns.

Q. (By Mr. Marcussen): If you know, Mr. Reed?

A. I can check them out here for you.

Q. Well, I don't want to consume too much time on it. Do you have any idea at all what it is about, what it consists of? The amount is some three thousand dollars merely for 1926 and '27, and also for 1929, and about two thousand dollars for 1928.

The Court: I am going to suggest that you check [125] this later, if it is necessary. The item is very small. I can't see that it is important.

Mr. Marcussen: It amounts to some nineteen thousand dollars in total, your Honor, and I am interested primarily in the nature——

The Court: (Interposing) May I see that, please?

The Witness: That is over 19 years thought, isn't it?

Mr. Marcussen: (Interposing) I am interested primarily in the source of the income.

The Witness: Or fifteen years. I have the returns here.

Mr. Marcussen: Well, shall we stipulate? Would you stipulate to having an explanation of that go into the records?

Mr. Cullinan: Yes, that is quite all right.

Mr. Marcussen: If so, we can just pass it up at the present time.

The Court: We are now referring to Exhibit 12,

(Testimony of Frazier O. Reed.)

and this is a statement of monies received in connection with these lands, and Mr. Marcussen wants to know what these miscellaneous receipts were. Is that correct?

Mr. Marcussen: That is correct, your Honor.

The Court: Column E refers to miscellaneous receipts. [126]

Then a recess will be taken after the testimony of this witness is given and you will have an opportunity to check back on those figures before the conclusion of the hearing, but we won't take the time to do it now.

While you are preparing for the next question, let me ask Mr. Reed one question: What was the total purchase price of the 27,500 acres?

The Witness: \$1,235,000, to which we added \$50,000 commission on the purchase, which made \$1,285,000 to the syndicate.

The Court: That is what figured into your cost basis for tax purchases?

The Witness: Yes, that is the cost of the land to the syndicate.

The Court: Now, what was the total amount paid? Now, let me see—how many participants were there in the syndicate originally?

The Witness: Fourteen, including Clayton & Company.

The Court: Fourteen. And each one contributed \$50,000?

The Witness: Yes.

The Court: And that was \$700,000?

(Testimony of Frazier O. Reed.)

The Witness: That is correct.

The Court: Well, yes, Exhibit 13 does cover this. Thank you very much. [127]

The Witness: Yes, but I am remembering back 19 years now, so——

The Court: (Interposing) Very good.

By Mr. Marcussen:

Q. Mr. Reed, I am handing you this paper entitled "Bloomfield Ranch, 1940," bearing a statement, or, rather, a heading "Supplies Segregated," another heading "Labor Segregated," another heading "Segregation of Income," and I will ask you to state what that is, please?

A. (Examining document) This was supplied by Mrs. Curry, the accountant who had charge of the income taxes for the syndicate, in response to your request for these figures. You asked me the other day if we would supply you with that breakdown.

Q. Yes. And is that a breakdown of items which appear on the return of 1940 in Schedule 2 (handing document)?

A. (Examining document) Yes.

Mr. Marcussen: As a matter of fact, I think counsel will stipulate to that.

The Witness: Yes, it is. I just wanted to be sure.

Mr. Cullinan: These also were taken from the partnership returns?

Mr. Marcussen: Yes. I think counsel will stipulate that is a breakdown of those items appearing as [128] expense deductions in Schedule 2.

(Testimony of Frazier O. Reed.)

Mr. Cullinan: Wait a second. 1940?

The Witness: You asked me for those the other day, you know?

Mr. Marcussen: Yes.

Mr. Cullinan: I haven't got a copy of this. What were these prepared from?

Mr. Marcussen: These were submitted to me by Mr. Cushing several days ago.

Do you recall?

Mr. Cushing: Mr. Reed brought those in to you. You asked me to make copies of them.

Mr. Marcussen: Yes, that is correct.

The Court: We will go off the record for just a minute.

(Discussion off the record.)

Mr. Cullinan: Yes, that information was supplied to Mr. Marcussen by Mr. Reed. It is the material that Mr. Reed obtained from Mrs. Curry.

The Witness: That is correct.

Mr. Marcussen: That is a breakdown of item of supplies, a deduction of supplies contained in Schedule 2(c) of the 1940 return.

The Court: Mr. Marcussen, I can't follow you, and I am sure the Reporter isn't going to be able to get this [129] very clearly.

Whenever you ask any questions and when you have a document in your hand which is the basis of your question, will you please read into the record the number of the document that you hold?

Now, let's start in all over again.

(Testimony of Frazier O. Reed.)

Are you asking this witness a question or not, or are you trying to get something settled by an off-the-record conference?

Mr. Marcussen: Well, I will offer this in evidence, your Honor. I don't think that counsel will have any objection to it. I have already identified it merely as a statement.

The Court: Well, you haven't identified it for any purposes because this has been just a little bit more than I can follow.

Now, what you have? What are you talking about?

Mr. Marcussen: I would like to explain it again. I have here a statement entitled "Bloomfield Ranch," under that a date, "1940," and it bears three statements with the following titles above them: "Supplies Segregated," and another statement "Labor Segregated," and another statement "Segregation of Income," and it is merely an itemization of the gross income shown on the 1940 return of \$8,806.07.

The Court: May I see the two documents? I am not [130] sure I understand you.

(Mr. Marcussen handed the document to the Court.)

The Court: And the gross income that you refer to is the gross income reported on Respondent's Exhibit "A."

Now, what is the purpose of offering this schedule?

Mr. Marcussen: Merely to show the breakdown

(Testimony of Frazier O. Reed.)

of the income, as to what it is from, what the source of the income is, so as to reflect the activities of the organization.

The Court: Off the record, please.

(Discussion off the record.)

The Court: Well, I am going to take a recess.

(Short recess.)

The Court: Are you ready to go ahead, Mr. Marcussen?

Mr. Marcussen: Yes, your Honor.

I have here a piece of paper bearing the title "Breakdown of Gross Receipts, Supplies and Labor, Items appearing on the 1940 Return of Bloomfield Ranch."

And I believe that counsel will stipulate with me that this contains a breakdown of those items which appear on the 1940 partnership return, which was filed by the syndicate.

Mr. Cullinan: That is all right. It is the detailed explanation of three items in the 1940 return which Mrs. Curry supplied to Clayton & Company, and Mr. Reed supplied to Mr. Marcussen. [131]

By Mr. Marcussen:

Q. And, Mr. Reed, I would like to ask you: Is this item of supplies, the detail of which is on this exhibit, are those the supplies purchased for the operations of Bloomfield Ranch in the year 1940? Is that correct?

A. It must be. (Examining document). Fertilizers principally.

(Testimony of Frazier O. Reed.)

Mr. Marcussen: I offer that in evidence.

The Court: Well, that is received in evidence as Respondent's Exhibit "B."

(The document referred to was marked and received in evidence as Respondent's Exhibit "B.")

[Respondent's Exhibit "B" appears on pages 197 to 198.]

The Court: Mr. Marcussen, the net figure for income as shown on the return is eight thousand, what?

Mr. Marcussen: Well, that is the gross income, if your Honor please, from operations. It is \$8,806.07, and that is simply a statement of the detail of that item.

The Court: At the bottom of Exhibit "B" is a tabulation of income which totals \$8,806.07. Above that is a tabulation of costs of various kinds called "Labor, \$3,934.89."

Does that figure appear on the return?

Mr. Marcussen: Yes, it does, your Honor.

The Court: May I see the return?

(The document was handed to the Court.)

The Court: The figure appears in Schedule 2(c) of the [132] return, and Schedule 2(c) in the return gives the total cost of labor and supplies, and then on Exhibit "B" is another item "Supplies, \$4,023.11," and that figure also appears in Schedule 2(c) attached to the return, which is Respondent's Exhibit "A."

(Testimony of Frazier O. Reed.)

That will serve to tie in Exhibit "B" with Exhibit "A."

By Mr. Marcussen:

Q. Now, Mr. Reed, I think you testified that the expenses listed on Exhibit 12 were all taken and deducted from the income from actual operations by Bloomfield Ranch; is that correct?

A. That is right.

Q. And I think you also indicated (but I want to make it very clear now) that some of those expenses were allocable to the income received from rents, is that correct?

A. Well, I suspect in this column that—does this reflect taxes?

Mr. Cullinan: No. The taxes are separately stated.

The Witness: Well, let me look here a minute.

All of the expenses appear in column "A," because in Column "B" the only deduction there is commissions.

Q. (By Mr. Marcussen): Is for commissions. So that part of the expenses [133] which are set forth in the column here immediately preceding Column "A" are allocable to the renting operations, is that correct?

A. Well, you are asking——

Mr. Cullinan: If you know?

Q. (By Mr. Marcussen): If you know?

A. I don't because—may I explain why I say I don't know?

(Testimony of Frazier O. Reed.)

Q. Yes, indeed, particularly in view of your statement a moment ago on direct examination—I think you intimated at that time that some of that loss is applicable to the renting operations by reason of the fact that the expenses are allocable to the renting operations?

A. Well, I would like an opportunity to explain my position as a witness here in connection with this matter.

In 1926, as I told you, we sent Mr. Curry to San Francisco for the purpose of ascertaining how the Bloomfield Syndicate should file its income tax return. He ascertained, and we filed that way until 1930. In 1930 the matter was reviewed, and the percentage of cost, and the percentage of profit was determined, and after that we went forward without any interruption from the Department or any other source, and the income tax matters were left entirely to Mrs. Curry, who succeeded to her husband's business when he passed away. [134] And, as I said this morning, I suspect that the reason why many items of expense were included in expense and not elsewhere is because the different men from the Income Tax Department requested that it be done that way.

Now, we didn't set this up as a going concern. We purely set up Bloomfield to sell it out as quickly as we could sell it.

Q. I understand that, Mr. Reed.

A. Therefore, I am unable, and there isn't anyone else who is able to tell you why all of those

(Testimony of Frazier O. Reed.)

items were put under "Labor" and not apportioned. Now, if there be some apportionable to rents, then it has not been done, and why it has not been done I don't know, because we were not running a business. We were simply handling this account for the syndicate members as agent.

Mr. Marcussen: Very well, Mr. Reed.

I will ask counsel whether counsel will stipulate to this: that the items of expenses under the general heading "Farming" contained on Exhibit 12 are the sum total that appear on the various tax returns of Bloomfield Ranch for the years indicated? Is that correct?

Mr. Cullinan: That is correct.

Mr. Marcussen: And I think that it is also stipulated that generally the expense items for each year were quite the same, were they not? [135]

Mr. Cullinan: So I am informd, in fact that is the information I got from my conversation with Mr. Reed.

Mr. Marcussen: Yes.

Mr. Cullinan: In your presence.

Mr. Marcussen: Very well.

Mr. Cullinan: I would ask Mr. Reed that instead of stipulating to it. He is the one that knows it.

The Witness: If there would be any item that you want, Mr. Marcussen, it is all itemized here.

Mr. Cullinan: We are not making any objection, except in general that is the character of expenses, is it not, Mr. Reed?

(Testimony of Frazier O. Reed.)

The Witness: The amounts change.

Mr. Cullinan: Of course, but in general the character of the expenses?

The Witness: Yes, yes.

Mr. Cullinan: So stipulated.

Mr. Marcussen: Very well.

Q. (By Mr. Marcussen): And then under those circumstances it is not known, is it, whether or not the actual operations from farming resulted in a profit and loss; is that not correct?

A. That is correct.

Mr. Cullinan: And when you say "farming,"—I would like counsel to make that clear. [136]

He means farming exclusive of renting?

Mr. Marcussen: Yes, I mean the farming operations actually carried on by Bloomfield Ranch, not by tenants, on its farms?

The Witness: The losses charged up or profits charged up would not include losses or profits of tenants. They would be the syndicate losses and profits.

Mr. Cullinan: I think the point about it is this: there are two items, two lines in the return, one is rents and the other is income from business.

The result is the same so far as taxes is concerned?

The Witness: Exactly.

Mr. Marcussen: Now, then, I have here a statement entitled "Statement of Farming Expenses for 1927 to 1930, inclusive, and for 1937 as shown by Bloomfield Ranch Partnership Returns of In-

(Testimony of Frazier O. Reed.)

come," and I will ask counsel to stipulate that that is the detail appearing on the income tax returns for the years indicated, and that it may go into evidence.

Mr. Cullinan: Correct. So stipulated.

Mr. Marcussen: I offer this in evidence.

The Court: That is received as Respondent's Exhibit "C."

(The Return referred to was marked and received in evidence as Respondent's Exhibit "C.")

[Respondent's Exhibit "C" appears on pages 198-200.]

Mr. Marcussen: I have here also another statement entitled "Statement Showing Total Disbursements to Investors," and it has here a list of all the money that was paid to each investor on his investment in Bloomfield Ranch, giving the date of the payment, and showing a total of \$98,250, with a statement at the bottom reading: "Total Pay to 14 Units, \$1,375,500," the first payment being January 19, 1928, and the last one December 29, 1944, and I will ask counsel to stipulate that that may go into evidence.

Mr. Cullinan: So stipulated.

Mr. Marcussen: It also has a statement at the top "To each Unit of the Bloomfield Ranch there was returned the original capital invested, and the profits arising from sales, rents, and farming operations, and so forth, as follows—" and then in

(Testimony of Frazier O. Reed.)

parenthesis "Letter, Clayton & Company, May 31, 1945."

And I will ask counsel to identify the letter as being a letter written by Mr. Reed to counsel; is that correct?

Mr. Cullinan: That is correct.

Mr. Marcussen: I offer this in evidence, if your Honor please.

The Court: Without objection that is received as Respondent's Exhibit "D."

(The document referred to was marked and received in evidence as Respondent's Exhibit "D.")

[Respondent's Exhibit "D" appears on pages 200-202.] [138]

Mr. Marcussen: Now, then, I have here a tabulation with numerous columns for each year from 1926 to 1944, and down at the side a list by years, also showing new pumping plants, fences, buildings, wells, pipe lines, and other items, together with repairs covering the same items mentioned, which has been submitted to me by counsel for the petitioner.

I would like to offer that in evidence.

Mr. Cushing: Did you say new pumping plant?

Mr. Marcussen: Both new and repairs.

Mr. Cullinan: And replacements.

Mr. Marcussen: And replacements.

Mr. Cullinan: That information, for what it appears to be, we concede it was supplied by Mr.

(Testimony of Frazier O. Reed.)

Reed, and we have no objection to its being introduced in evidence.

Mr. Marcussen: I would like to introduce that in evidence.

The Court: Received as Exhibit "E."

(The document referred to was marked Respondent's Exhibit "E" and received in evidence.)

Q. (By Mr. Marcussen): Now I hand you. Mr. Reed, Respondent's Exhibit "E" and ask you to look at it as I would like to ask you some questions about the items there.

Was that statement prepared under your direction? [139]

A. (Addressing the Court) I just said to your Honor that I am proud of it, I prepared it myself Sunday.

Q. Very fine.

A. Because I didn't have time to get it to you before that.

Q. Very well. You have a copy of it with you?

A. (Continuing) Coming to trial on Monday.

Q. You have a copy of it with you?

A. Yes. You may have that. That is a duplicate of this (indicating).

Q. Now, as I understand it, there were some wells and properties, improvements, I should say, already on the property that was purchased, is that correct? A. That is correct.

Q. And are they set forth under the year 1926 here? A. No; only one is.

(Testimony of Frazier O. Reed.)

Q. Well, the first item here is "Frame warehouse" for "\$10,000."

That was already on the property at the time it was purchased? A. That is right.

Q. Then there are "two frame buildings, \$20,000."

A. Now, let me explain, if you will, that one, two, sixteen and seventeen are purely work sheet reference numbers. They do not mean two frame buildings, or sixteen [140] pumping plants, or 66 fences.

Q. I see.

A. Or 22 wells. That is just put on there so that if you want more detail on those items I can refer to my work sheet.

Q. Well, then, for the year 1926 what does that list of items purport to be? A. For 1926?

Q. Yes.

A. "Frame warehouse, \$10,000, frame buildings," those are various buildings scattered all over the 27,000 acres.

Q. Yes.

A. "\$20,000." Then I have under "X-1" means explanation 1, and we probably had 100 miles of fences that we didn't set up at all because we were not concerned with taking credit for all the deductions we could. We just set up the buildings and forgot the fences and never did set them up, and X-2 is pumping plant, \$1182.50.

Q. That is the value that was assigned to the pumping plant already in existence?

(Testimony of Frazier O. Reed.)

A. That particular pumping plant, but if I may look at that map——

Q. Surely.

A. (Continuing) ——I can show you where there were wells at the time. [141]

Q. I wonder if we can let that go for the moment, Mr. Reed, and I will ask you some other questions about this.

Now, were there any other improvements on the property at the time in 1926 other than those you have listed there? A. Yes, sir.

Q. What particular items of improvement have you listed here under the column headed "1926" which totals some \$31,000?

A. The frame warehouse is an individual building.

Q. No. I mean, how did you select these items to put here, Mr. Reed?

A. Those that we thought of at the time Mr. Curry was making up a list of buildings for depreciation purposes, and I will say to you now I was not very—my memory on that day was very poor because I didn't make it broad enough.

Q. Yes. Were there any other substantial items of improvements on the Bloomfield Ranch at the time it was purchased which are not listed here in 1926?

A. Yes, a good many wells, irrigating plants.

Mr. Marcussen: Well, now, I would like to make this statement: I think, apparently, there has been a misunderstanding.

(Testimony of Frazier O. Reed.)

The Witness: And some buildings——

Mr. Marcussen: (Interposing) If you will excuse [142] me just a moment, Mr. Reed.

If Your Honor please, I think there has been a misunderstanding with counsel because I discussed this with both Mr. Cushing and Mr. Cullinan, and requested (and I think that they undertook to produce it, but in the limited time apparently that was impossible) a statement showing the itemization and the amounts of the improvements that were on the property at the time it was purchased, together with a statement of the property that was added, the improvements, both wells and pipe lines, buildings and that sort of thing. Now, we don't have that in this statement, apparently, and I was wondering if counsel would agree to supply that in view of the understanding we had before the trial.

The Court: Before you answer that, Mr. Cullinan, let me ask Mr. Marcussen if he is trying to develop a certain point.

In this line of cross-examination are you trying to establish that Clayton & Company made improvements on this property and used the original improvements and the additional improvements for the purpose of carrying on a business on the property for the purpose of gain and profit?

Mr. Marcussen: Eventually that is what I wish to show, if your Honor please. I wish to show that there were many improvements made by Clayton & Company—— [143]

(Testimony of Frazier O. Reed.)

The Court: (Interposing) Well, now, seriously, Mr. Marcussen, do you contend that these improvements were so substantial that the conduct of the business was really a factor so far as the issue in this case is concerned?

Mr. Marcussen: Yes, I think it was.

The Court: Do you dispute the Petitioner's testimony given on direct examination that the property was maintained during the period in which it was held for sale in good condition, and that in order to maintain it in good condition some of the land was under cultivation, but that the activity that was carried on was primarily maintenance activity, just as a trustee of property keeps property with some tenants and probably operates it to some extent rather than to let it go down during the period in which it was held for sale?

Mr. Marcussen: Yes, I do, your Honor. I wish to show that in addition to that Clayton & Company as the operator for Bloomfield Ranch, actually made additional investments in the property by way of improvements, and that they were made for the purpose of facilitating their operations and of engaging in business, and that they called for business decisions from time to time for Clayton & Company to make. Now, then, this is—

The Court: (Interposing) Well, if that is your theory. I wonder whether you really have ever taken that up [144] with Mr. Cullinan because, as I get the picture in this case, and from looking rather hurriedly at the income tax return that is in evi-

(Testimony of Frazier O. Reed.)

dence as Exhibit "A," it doesn't appear to me that Clayton & Company realized very much income from this kind of operation of the property.

Now, supposing the Petitioner conceded all of these facts that you want to bring out on cross-examination, what are those facts relating to the operation of the property and the receipt of some income to the other body of facts which are made up of the sales of property and the receipts from sales?

Now, in weighing the evidence in this case, if the income from these so-called business operations that you refer to is a net amount of a thousand dollars a year, or two thousand dollars a year, and the gross receipts from sales of property is \$100,000, \$200,000, \$500,000 a year, I don't think you could seriously argue that these operations were carried on for any other purpose than the taxpayer says they were carried on.

I am wondering if you are not straining some minor point here, and, if so, you are going to keep us here late, and you are going to take up a lot of time, I think, with some inconsequential evidence.

Mr. Marcussen: I don't think it is inconsequential, your Honor. I think it is exceedingly important. [145]

The Court: Well, I am going to call on you to make an offer of proof because I think it is something that could be taken care of in ten minutes. That is my hunch about it. Now, if I am mistaken, why, I will be glad to have you point out that I

(Testimony of Frazier O. Reed.)

am mistaken, but I would like from your preparation of the case (and I know that it is not going to hurt your case) to ask you to make an offer of proof because Petitioner, that is, Mr. Reed and Mr. Cullinan, have shown that they are willing and anxious to present all of the facts. In fact, I think all of the facts in this case could have been stipulated. Now, it does run up the record unnecessarily to go into these items with such particularity.

Now, what is the broad overall picture as you see it on this point of the operation of the property? What were they doing? How much were they making a year, and all of that? Now, I know perfectly well, as any reasonable person would know, that if there were—this property, as I understand it, has been operated by Miller & Lux as ranch property, that is, they had hundreds of thousands of head of cattle grazing on the land. They had to water the cattle. Therefore, they had to have a water system. They had to feed the cattle; therefore, they were raising grain. That was dry farming, but they probably needed water for some purposes.

Now, they had on the property some pipes, they had a pumping system, they had an irrigation system. That [146] was on the land when it was taken over by Clayton & Company.

And Mr. Reed has testified that—I understand from his testimony, as it isn't very much on this point, that the implication of his testimony is that the pipe and water systems had to be kept up. Now, we all know those water systems on ranch properties turn out to be rather expensive if they are let go

(Testimony of Frazier O. Reed.)

to ruin. Therefore, a gentleman—what was his name, Mr. Cullinan?

Mr. Cullinan: Fitzgerald.

The Court: Fitzgerald was taken over from the old concern because he knew where these water properties were. Now, anyone buying that property would consider the pipe lines, pumping system of value. Therefore, they would have to be kept up in order to realize a good price in the sale of the property. They wouldn't want to take over some agricultural land and let the water system go to wrack and ruin so that the buyer would have to invest \$10,000 to repair something that was there originally. That is poor business. Now, if your point is that they were really making an investment, then I think you ought to say so and the taxpayer's counsel ought to have an opportunity to meet that argument right away. That isn't, so far as I understand, the evidence so far. Clayton & Company was not making any large investments in a water system or in [147] a pumping system.

Mr. Marcussen: Well, that is just what I wish to ascertain, your Honor.

The Court: Well, I think you ought to be able to get that out rather quickly.

Now, Mr. Reed, apparently Mr. Marcussen wants you to explain whether you made substantial investments in this property, substantial improvements on it. He wants to know whether you put in a big pumping system, a big water system, whether you put on a lot of sheds, and warehouses, and so forth.

(Testimony of Frazier O. Reed.)

Now, the schedule that you made up, I suppose you made up of items that figured in taking a depreciation in income tax returns, is that correct?

The Witness: That is correct.

The Court: So you didn't add to the list of properties of the land?

The Witness: No.

The Court: But you just took the list that had been used all along for purposes of taking depreciation on the returns?

The Witness: Yes.

The Court: Now, will you make this short, and you know what Mr. Marcussen wants to know. I know what he wants to know. And will you answer my question now. Tell us [148] as briefly as you can what improvements were made on these ranch properties after Clayton & Company took them over, indicating approximately how much money was spent, and why you made the improvements, and whether you received any substantial income each year as a result of the operation of these properties, and, if so, what the amount of the income was, and see if you can get that all cleared up for us in just about five minutes.

Mr. Marcussen: If your Honor please, I would like to have——

The Court: (Interposing) Would you let the witness answer the question, please?

Mr. Marcussen: Surely.

The Witness: The expenditures for 18 years, beginning with 1927 and ending with 1944, which

(Testimony of Frazier O. Reed.)

is four years beyond the year being questioned here, the expenditures averaged \$2897.61 a year.

Q. (By Mr. Marcussen): Is that taken from this Exhibit 12? A. That is right.

Mr. Cullinan: That is for improvements?

The Witness: That is right.

Breaking it further for your record, if you want, value set up in 1926, \$31,182.50. [149]

Q. (By Mr. Marcussen): That is the total of the first column under 1926 on Exhibit "E", is that correct?

A. Correct. None of that money was spent by the syndicate. Those were simply values that were set up by Mr. Curry as of the date of the end of 1926. Say, for income tax depreciation purposes, expended in 1927 through 1940, fourteen years, \$47,661.67. Expended——

Q. (Interposing) Now, Mr. Reed——

The Court (interposing): Will you let the witness finish answer the question, please, Mr. Marcussen?

The Witness: Expended in 1941 through 1944, four years, \$4,501.64.

Now, if you divide the total money expended from January 1, 1927, to December 31, 1940, by fourteen years, you will get \$3,404.40 per year. If you divide the money expended from January 1, '41, to December 31, '44, four years by four years, you will get \$1125.41.

The Court: You haven't finished answering my question, though. My question covered more than that.

(Testimony of Frazier O. Reed.)

The Witness: All right, I will go on.

The Court: What did you spend the money for? You better go back first. You had some improvements on the land when that was taken over from Miller & Lux. Now, if you will please give us a complete description of what was there. [150]

The Witness: There were, oh—I would have to look at the map to count the pumping plants that were there.

The Court: All right. Give Mr. Read that map.

(The Clerk handed the map to the witness.)

The Witness: You understand when we were selling lands through here, and in here, and in here, and in here, and in here (indicating)—

Mr. Cullinan: (Interposing) Now, Mr. Reed, the record will not show what you are pointing at when you say “in here” and “in here” and “in here.”

The Witness: Well, when we sold portions of certain of these 21 ranches we often were compelled to sell the existing pumping plant with the portion we sold. That left us with remaining lands without any pumping plant, and we put a pumping plant back to replace the old that was sold, so it could be used on the remaining lands.

The Court: Well, now, explain in the first instance how many pumping plants were on the land (that is what you started to do) when you took it over from Miller & Lux.

The Witness: All right. There is a pumping

(Testimony of Frazier O. Reed.)

plant on Parcel 10 (indicating). There is a pumping plant on Parcel 11. There is a pumping plant on Parcel 13. [151]

Q. (By Mr. Marcussen): Is it possible to state as you go along whether or not they were constructed by Clayton & Company or were in existence?

A. No, these were on the land at the time the lands were purchased by the syndicate.

A pumping plant on Parcel 14, two pumping plants on Parcel 14; three pumping plants on Parcel 15, one pumping plant on Parcel 17. There were 9 pumping plans upon the ranches when they were purchased from Miller & Lux.

The Court: Now, what is a pumping plant?

The Witness: Well, that is a well.

The Court: It sounds, you know, like something they would have down at Boulder Dam.

Mr. Cullinan: And describe it.

The Court: Better describe what these pumping plants are and about how much it costs to put one in, and why you have one. Is it a little thing or is it a big thing?

The Witness: They develop between, oh, 600 and a thousand gallons of water per minute.

The Court: Do they pump the water out of a well?

The Witness: Out of a well. These wells in here, all through here (indicating) are anywhere from 200 to 300 feet deep.

(Testimony of Frazier O. Reed.)

The Court: Do you have a Diesel motor on them, or electric pump? [152]

The Witness: Well, when we took over many of those wells were equipped with a centrifugal pump, which can only pull the water a certain height, or from a certain depth, and in 1931—I don't want to forget that, because we had a cycle of dry years in California that became acute in 1931, and this is supported by the meteorologists, the weathermen all through California, to the end that it was necessary for us to do away with all but one of the centrifugal pumps and install in lieu thereof the deep well pumps.

The Court: Deep well?

The Witness: Deep well pumps, that is a pump that has balls at the bottom. A motor turns it rotary fashion and it forces the water to the top from a depth that a centrifugal pump couldn't get near. I think a centrifugal quits along about 30, 35 feet, and when the water in the well comes to less than 35 feet from the surface your centrifugal is of no value, and that happened all over the Santa Clara Valley. It was not here in particular. In fact, it happened all over California.

The Court: Well, how much did it cost you to put in those deep well pumps? Was that a substantial item when you had to do it all at once?

The Witness: Yes, and then when we pulled the old centrifugal pumps it was necessary to—the centrifugal pump [153] usually sits in a pit, that is, anywhere from 15 to 20 feet below the surface

(Testimony of Frazier O. Reed.)

of the ground, so that the suction to the water will take that much longer to break. If the pump sat on the surface of the ground, say, it would break at 30 feet. When you put it down 20 feet you then can draw water from 50 feet. And we had until 1944, when we sold this tract of land in here, a centrifugal pump that sat on top of the ground, which gives evidence that the wet land that I was telling you about——

Mr. Cullinan (interposing): Mr. Reed, would you stick to the question? I think you are wandering a little bit now.

The Witness: But it is all with regard to it.

Mr. Cullinan: The question is: What changes in the wells were necessary? That is what you started to tell.

The Witness: Well, when the water went down in '31 we had to change over to deep well pumps, and in order to install a deep well pump it was necessary in many instances to run a new casing down and then fill around the casing in the pit. You run the casing down the pit. That is an open hole.

The Court: All right, now we understand that. Now, how much did that all cost you?

The Witness: Well, everything done over a period of 18 years, including all of that work, only cost \$52,162. [154]

The Court: Well, that won't do exactly. Counsel for respondent is making quite a point of this. He attached a lot of importance to it. You had, maybe,

(Testimony of Frazier O. Reed.)

ten or fifteen pumps here to reconvert. About how much would it cost to put in a deep well pump?

The Witness: I have never broken that down, but this statement, if they want to take the time, we can do it exactly.

The Court: No, I am trying to save time. Now, would you look at that and tell me, if you can, about how much did it cost, or find something there that would give us an idea?

The Witness: Well, in 1927 we put in a new pumping plant that cost \$1940. In 1928 we bought surface irrigating pipe, which cost \$1,000.

The Court: Now, all of that detail is on Exhibit "C", is it?

Mr. Cullinan: "E".

Mr. Marcussen: "E".

The Court: "E".

Mr. Cullinan: It can all be worked out in the briefs.

The Court: Well, I don't know. It can be, if it is made perfectly clear that the purchases of pipe and the installation of pumps was only for the purpose of reconditioning [155] something that was already there, and if that is true, I want to know that from the witness. You can't cover that by the brief.

The Witness: Well, we put in——

The Court (interposing): Let me ask you this:

Now, you have indicated how many pumps there were, and you have said that during a drought

(Testimony of Frazier O. Reed.)

period you had to change some of those pumps over to deep well pumps.

The Witness: Yes.

The Court: Now, did you put in any new pumps, or were your expenditures limited to reconditioning the old pumps that were there?

The Witness: No; we put in some new wells.

The Court: All right.

The Witness: And new pumps.

The Court: Now, how many, and why did you put them in?

The Witness: I can answer you why, but I can't tell you the number because I have never broken it down that far.

The Court: Can't you guess? Was it between——

The Witness (interposing): I don't like to guess.

The Court: You have to know. You are in a spot now because we want to know this, and you have to guess. You will have to guess within a margin. [156]

The Witness: I would say probably we put in ten new wells.

The Court: All right.

Q. (By Mr. Marcussen): On the entire property, Mr. Reed, is that correct?

The Court: Ten, more or less, that is fair enough. Now, why did you put them in?

The Witness: Because in some instances we sold the pumping plant by which the remaining land was irrigated.

The Court: You mean you sold a piece of land on which there was a pumping plant, is that right?

(Testimony of Frazier O. Reed.)

The Witness: That is right, and in some instances we had to put in a new pumping plant to take care of the remainder of the land.

The Court: Well, now, without going into any more detail about that, why did you have to have any water on this land if you had just bought it for resale?

The Witness: Because of the depression stopping the sales in 1930. We sold 25,000 acres up to the end of 1930, and we had about 2500 acres left, and there was just no sale, and——

The Court (interposing): Well, now, the government's view——

The Witness (interposing): For the remainder.

The Court: Mr. Reed, you will have to keep in mind [157] what the theory of the government in the case is. The government visualizes this in this way: You, representing the taxpayer, say that you bought 27,500 acres of land for the purpose of reselling it.

The Witness: That is right; that is right.

The Court: Now, the government takes this view about it: if that was all you were going to do with it, it is just God's open country, you don't need to do a thing to it except go sell it. You don't have to have any water on it, you don't have to do anything. That is, perhaps, an academic view, but that is the view they are taking.

Mr. Marcussen: May I state for the record that is not the Respondent's view, Your Honor.

The Court: Well, it must be your view because when you go beyond the point of holding this as

(Testimony of Frazier O. Reed.)

barren and lifeless and arid land, or something, just solely for the purpose of resale, your theory is as soon as you go one step beyond that you are engaged in business of operating the land for profit.

Mr. Marcussen: No, Your Honor, that is not Respondent's position. Respondent's position——

The Court (interposing): You stated that was your position a few minutes ago.

Mr. Marcussen: No, I beg your pardon, Your Honor. I don't think I did. [158]

I wish to have an opportunity to answer the statement, Your Honor, made some time ago. I can probably do it on brief, and I don't suppose it is necessary here.

The Court: Well, I will finish with this my way.

Why did you have to have any water on your land?

The Witness: From what sources would we have gotten the money to pay the taxes upon the unsold land?

The Court: Now, the theory in these cases is that the taxpayer goes into a business for profit, and had you gone into the business of raising cattle on this land during the period you were holding it?

The Witness: No.

The Court: Had you gone into the business of raising grain on the land?

The Witness: Only in the beginning as a means of keeping the land in condition.

The Court: Is that why you needed water?

The Witness: No. Well, we needed water when the price of barley and wheat went lower than in the history of this country.

(Testimony of Frazier O. Reed.)

Q. (By Mr. Marcussen): As a matter of fact, when you discontinued the growth of grains and the cultivation of grains, and went into truck farming you needed this water for those operations, whereas, you hadn't needed it for the wheat and other grains, is that correct, Mr. Reed? I think you stated that in your direct examination.

A. Well, we took over the Miller——

Q. (Interposing): Well, isn't that——

A. (Interposing): Just a minute now! When we took over the Miller & Lux holdings they were growing garlic, which requires some irrigation. They were growing some tomatoes, they were growing potatoes, they were growing strawberries when we took over, plus other truck crops. And we never went into operation for rental income. We did it because we were forced into it by the depression conditions. And I have tried to explain that to everybody all the way up here.

The Court: That was why you had water then to carry on, you had to have your water to carry on this truck farming, is that right?

The Witness: That is right, to keep the land from going to waste, because only a fool would plant barley or wheat to keep land clear that he couldn't sell, and that he couldn't make a profit on the produce.

The Court: Well, I think that covers it.

You testified on direct examination that some part of the land was kept under cultivation, and we have evidence, I think, on what the income from those

(Testimony of Frazier O. Reed.)

operations was. And you have testified that the income from such operations in [160] effect helped you to carry the property to pay taxes and so forth.

Now, we have in evidence as Respondent's Exhibit "E," a schedule of that.

Now, what is the purpose of Respondent's "E" in evidence?

Mr. Marcussen: The purpose is to show the investments which were made in each one of the years from 1927 through 1944.

The Court: By this taxpayer?

Mr. Marcussen: Yes, by this taxpayer.

The Court: Does Exhibit "E" show any figures, Mr. Reed, which do not represent investments made by the Bloomfield Ranch properties?

The Witness: Yes.

The Court: Will you read them into the record, please?

The Witness: The figures appearing in the column headed "1926" were set up by the income tax accountant for depreciation purposes, and those amounts of money were not expended by the taxpayer.

The Court: Do you have a recapitulation anywhere here (examining document)? No. Only the bottom column?

The Witness: Yes.

The Court: Or totals? [161]

The Witness: Yes. If you want, I will put that on for you.

(Testimony of Frazier O. Reed.)

The Court: You had a recapitulation on some copy that you were reading from?

The Witness: Yes.

The Court: Well, then, with that explanation does Exhibit "E" speak for itself, Mr. Marcussen?

Mr. Marcussen: No, I don't think it does, Your Honor.

The Court: What more do you want the witness to explain from Exhibit "E"?

Mr. Marcussen: I will ask him a couple of questions, if I may, and clarify it.

Q. (By Mr. Marcussen): Now, those figures include, I think you stated——

The Court (interposing): Just a minute, please.

I would like to ask the witness to copy onto Exhibit "E" a recapitulation which he has on his own copy. I think it would clarify——

The Witness (interposing): You may substitute this for Exhibit "E," if you like, and I will take this (indicating).

The Court: All right. Are these two otherwise the same?

The Witness: They are identical. [162]

The Court: Mark this as Exhibit "E."

Mr. Marcussen: This simply has an additional statement, I take it?

The Court: Well, you can look at what is done there.

Off the record.

(Discussion off the record.)

(Testimony of Frazier O. Reed.)

Q. (By Mr. Marcussen): Well, that is not the total of all the expenditures by the Clayton Company, the \$83,000? A. Oh, yes, it is.

Q. By the Clayton Company? Now, just let me ask you these questions.

It says here "Balance set up in 1926," and I think you testified a moment ago that 1926 contains a statement of some of the improvements that were already on the property at the time it was purchased; is that correct? A. That is right.

Q. It is included in your total of \$33,000; is it not? A. That is right.

Q. And that is a total of \$31,182.50; is that correct? A. That is right.

Q. In determining the total that was expended by the Bloomfield Ranch, we must deduct that figure from the total, [163] is that not correct?

A. That is what I did here (indicating).

Q. No, I don't think you did. I think you added these.

A. Well, I mean that if you deduct——

Q. (Interposing): Just let me ask these questions, and you answer them for the record, Mr. Reed.

The total improvements in money value, or cost, I should say, made by Bloomfield Ranch are contained in the columns 1927 through 1944, is that correct? A. That is correct.

Q. And the total that you show here, the \$83,000, includes also the \$31,000 shown in 1926, which was not an improvement made by Bloomfield Ranch, but was already there at the time the property was

(Testimony of Frazier O. Reed.)

purchased, is that correct? A. That is right.

Q. Therefore, by deducting the \$31,000 from the \$83,000 we will get the total represented in the columns 1927 to 1944, which represents the amount of the cost of the improvements made by Bloomfield Ranch, I should say by Clayton & Company as operator of Bloomfield Ranch, is that correct?

A. That is correct.

Q. Very well, I think we have that straight then.

Now, with respect to that sum total, which is approximately \$52,000, I think you stated that some of it did not [164] represent entirely new improvements but represented changes in existing facilities on the property, is that correct?

A. That is right.

Q. And those changes consisted not in reconditioning but actually changing the nature of the installation entirely, is that not correct? I think you mentioned rotary pumps a moment ago, and you put in an entirely new installation.

A. I would say that it included both because I didn't know that you wanted this broken down in the detail that you are asking for now, or I would have stayed up longer on Sunday night.

Q. Well, then, do you have any idea at all as to what proportion of that \$50,000 represents new improvements and what proportion of it is reconditioning? A. I do not know.

Q. And what proportion is repairs? Do you have any idea as to that?

(Testimony of Frazier O. Reed.)

A. Let me explain this: in 1931 you will see a charge of \$125.35 which is listed as a well. Now, you couldn't buy the casings for a well with \$125, so that item in itself tells you that it is some improvement made to an existing well.

Q. Well, the item doesn't—

The Court (interposing): You are going into a lot of unnecessary detail, Mr. Marcussen. Now, the taxpayer witness has testified they carried on some truck gardening. He has told why they did it. And I think the record by now shows how much they got out of it a year.

Mr. Marcussen: Well, I would like to ask a question as to what is the significance of these "X" marks on the side, if Your Honor please.

The Court: Well, that isn't what you have been asking. I am telling you that you are going into too much detail. Now, go ahead from there. But you are going into an awful lot of detail that isn't necessary in your case.

Q. (By Mr. Marcussen): Well, picking up with the witness where he left off, you state that the item in 1931 for \$125.35 was merely a repair to an existing well, is that correct?

A. That is correct.

Q. That is marked with an "X-4" in the extreme left hand column of this exhibit. Do you notice that? A. Yes.

Q. Now, I notice a number of others items. I won't identify them now. But there are one, two, three—

(Testimony of Frazier O. Reed.)

The Court (interposing): He has already explained that, hasn't he?

Mr. Marcussen: Four, five, six. No, I don't think he has. [166]

The Court: Didn't you explain those with reference to your work sheets?

The Witness: The numbers, but these "X-4—"——

Mr. Marcussen (interposing): I am not talking about those numbers.

The Witness (continuing): I put down there just to remember that I should tell you not every time you see a debit entry in one of these columns labeled out here "well" does it mean a new well.

Q. (By Mr. Marcussen): Very well. Now, I will ask you with respect to each one of those other items that I just identified.

Are they also in the same category as the item of \$125 for the year 1941, which you just described a moment ago? In other words, are those repairs to existing facilities?

A. No, that doesn't—those are just made as memoranda, those "X-1" up to "X-4".

Q. Very well. What is the significance of those items? Are those items all the same? Do they have some point in common?

The Court: I told you a few minutes ago you are going into too much detail.

Mr. Marcussen: Well, if your Honor please, I am attempting to understand this exhibit.

The Court: I think the exhibit is perfectly clear.

(Testimony of Frazier O. Reed.)

The issue in this case doesn't require that you get the witness to explain these little things that you are asking him about.

Mr. Marcussen: Well, I would like to show the amount, the value of the improvements which were made which constituted new improvements. Now, I had a discussion with counsel before this case was tried, and it was undertaken to supply that, and when I started cross-examination on this point quite some time ago I attempted to show that there had apparently been some misunderstanding in that request for information, and I want to point out——

The Court: Yes, I know, you pointed that out quite a while back.

Now, do you want to withdraw Exhibit "E", or do you want to leave it in?

Mr. Marcussen: No, I merely want to ask counsel now whether we can stipulate to that amount, and whether that amount will be stipulated to in accordance with an agreement made before the trial.

Mr. Cullinan: We will be glad to supply it, if it is capable of supplying. Mr. Reed explained it to you, that he was having great difficulty identifying expenses because of the way they kept the accounts on old wells and those on new.

Am I correct, Mr. Reed? [168]

The Witness: That is right. We have had no setup of wells. There has been no——

The Court: Well, may I suggest, Mr. Cullinan, that, perhaps, failure of proof on this point is

(Testimony of Frazier O. Reed.)

worth more to you than going to the trouble of supplying this kind of detailed information. I think it is up to you to decide whether the issue requires that you give a breakdown of how much was spent for some new equipment on pumps and how much was spent for repairing some old pumps in view of the fact that the total amount expended for all of this over a period of fourteen years was not very much. Now, if you want to supply that evidence——

Mr. Cullinan: We will agree to.

The Court: If you think that it is worth going to the trouble, I will receive it and keep the record open.

Mr. Cullinan: I do think so.

The Court: But if you think that it isn't necessary, then you certainly are entitled to use your judgment on that.

Mr. Marcussen: If your Honor please, I wish to state for the record that if I did not have confidence that this information would have been supplied, I would have subpoenaed such records as would show it and bring them here, and for that reason I do not think the respondent's position should be prejudiced.

The Court: Mr. Marcussen, as you say, you don't [169] think respondent's position should be prejudiced. I still don't think that this is really very important to your case. I think you would still be wasting a lot of time if you subpoenaed those records.

(Testimony of Frazier O. Reed.)

Now, what is the total amount that has been spent there? You want to have the figure broken down, don't you?

Mr. Marcussen: Your Honor has referred to the comparatively small sums that have been put into these operations or into these improvements in proportion——

The Court (interposing): I am thinking about the issue in this case and the decisions by the Courts and the decision by this Court, the decisions by the Courts on appeals, and the decisions by this Court, and think you are going into too much detail, and I will stick to that.

Now, I will ask you a question: What is the total figure you wish to have broken down?

Mr. Marcussen: That is some \$52,000 of improvements made.

The Court: You want to have a fifty-two thousand dollar figure broken down into two figures, is that correct?

Mr. Marcussen: Yes.

The Court: Let us just be sure what you want.

Mr. Marcussen: That is correct.

The Court: All right. And you want that figure broken down to show how much of \$52,000 was spent for repairs [170] and how much was spent for new equipment?

Mr. Marcussen: New equipment and new installations, not including repairs, for example, a complete change in the installation.

(Testimony of Frazier O. Reed.)

The Court: Well, we also could have one day's trial arguing about what represented repairs and what represented new installations. Now, don't let's get into that either.

Generally, that is what you want, is that correct?

Mr. Marcussen: That is correct.

The Court: All right. I can imagine that we could have a fine argument about whether enlarging a pit or a deep well pump was a repair or a new installation.

Mr. Marcussen: I don't think we would have any argument about it. I think we will stipulate with counsel.

The Court: I still think you are going into too much detail.

Mr. Marcussen: I want to point out—As your Honor pointed out you considered that these amounts were apparently trivial and small in comparison to the size of the whole operation. I want to emphasize that 90 per cent of this entire property was sold in the first four or five years, there remained only about 10 per cent, namely, some 2600 acres, and an expenditure of \$60,000 in that time in [171] improvements and repairs for the operations that were conducted, namely, farming operations is not a minor matter, and I think it is important.

The Court: Well, that is your statement at the present time. I would say that your argument was not one that I could give very much consideration to, but supposing you go ahead now. We have finished with Exhibit "E" at this point.

(Testimony of Frazier O. Reed.)

Q. (By Mr. Marcussen): Well, Mr. Reed, with respect to those improvements that were made, who decided to make those improvements, whose judgment was involved? Was that your judgment?

A. Yes.

Q. And did you consult with engineers with respect to the matter of improving the property and receive their advice on it? A. No.

Q. You were familiar enough with the situation yourself to make those decisions?

A. We have farmed many thousands of acres in addition to this for other customers and for ourselves, and I think this record reveals that we are quite successful as farmers.

Q. Now, I think the record shows also that the bank loans were paid off, the bank loans and also the loans from Miller & Lux of some \$200,000, and the bank loans of some [172] \$300,000. I think, making a total of \$585,000 were paid off rather shortly after the operation commenced; is that correct? A. I think in '27.

Q. In 1927? A. It was completed.

Q. And who exercised discretion with respect to the payment of those bank loans? Did you discuss that with anybody, or did you as the manager— A. (interposing): I did.

Q. You came to that conclusion?

A. Yes. I was trying to beat the depression to get out of debt. We expected it to come; we thought it would come before 1929.

Q. Very well. I think you have there the ex-

(Testimony of Frazier O. Reed.)

hibit which is the map. Can you get that out? This is Petitioner's Exhibit 14.

And I call your attention to the statement on the map that "only parcels 1 and 14 and portions of parcels Nos. 10 and 15 had been subdivided. The subdivided portions represented less than 6 per cent of the total area of the 21 ranches."

Now, are those the subdivisions referred to by Clayton & Company, were those the subdivisions which were made by Clayton & Company? [173]

A. Yes, Sir.

Q. And then in addition to that there was other land which was already subdivided, is that correct?

A. Oh, no. It was just these little lots here (indicating), maybe, not over 20 in the City of Gilroy, and I think this parcel too (indicating).

Q. Now, wait a minute. Those in the City of Gilroy, and not exceeding over 20, were those that were already subdivided by Miller & Lux, is that correct? A. That is correct.

Q. Are they included in this 6 per cent?

A. Yes, sir.

Q. They are included here?

A. Beg your pardon. No, they are not.

Q. They are not.

A. Because they were already subdivided. Parcels that we subdivided represent less than 6 per cent of the whole.

Q. Correct. This reference, then, on the map is to the subdivisions which Clayton & Company, the operator for the Bloomfield Ranch, actually made, is that correct? A. That is correct.

(Testimony of Frazier O. Reed.)

Q. Now, in the course of the subdivision, will you state briefly, very briefly, what is the procedure to be followed? You file a map, do you, with the city authorities? [174]

A. Yes, with the County.

Q. With the County?

A. With the County.

Q. And you filed those maps for Clayton & Company? A. That is correct.

Q. And for Bloomfield Ranch?

A. That is correct.

Q. And then in addition to that I think you stated a moment ago that there were no actual improvements made by Clayton & Company, that is, putting in the curbings, or laying streets, or any of that sort of thing, none of that was done by Clayton & Company, is that correct?

A. No. There may have been a grading of a road with a road grader, but no—just temporary.

Q. But I take it that Bloomfield Ranch actually did convey some of the properties to the County or to the City for the purpose of making those streets, is that correct?

A. They dedicated land into county roads for the use of the public.

Q. That is right. A. And easements only.

Q. And they filed certain deeds with the proper officers concerning that?

A. Maps; not deeds; maps. The dedication is upon the official map in California. [175]

Q. Now, I think you stated that most of the

(Testimony of Frazier O. Reed.)

property (and I think it is contained in the stipulation), about 90 per cent of the property was sold in the first four or five years of operation, and after 1931 there were very few sales; is that correct?

A. Yes, sir.

Q. And you stated at that time that you couldn't sell it. Do you mean actually that you couldn't have found a purchaser at any price for the property?

A. I gave as an illustration that Brentwood Orchard, which——

Mr. Cullinan: Just answer the question, please.

The Court: Just "Yes" or "No".

The Witness: Well, when I am asked a question, could I have found anyone at any price, that is too broad, because——

Mr. Cullinan (interposing): You could have given it away?

The Witness: Oh, yes. That is too broad.

Q. (By Mr. Marcussen): You mean you couldn't have sold it at a profit? About what would you consider to be a profit? You mean a profit commensurate with the level of——

A. (Interposing): We could have cut the price of the land half and we could not have sold it. We probably could [176] have cut it down in price by 75 per cent and couldn't have sold it in 1930, '31 and '32. Brentwood Orchards came down from \$700 an acre to \$100 an acre, as I told you this morning.

Q. And your reason for not selling that is that you wished to keep it, maintain the property until

(Testimony of Frazier O. Reed.)

such time as you figured you could sell it at the profit you expected on the operation, is that correct?

A. Clayton & Company made——

Q. (Interposing): Would you just answer that?

A. (Continuing): ——made representations to the syndicate members, as I have testified here, and naturally we wanted to make a profit for them if we could, and we didn't want to give anything away.

Q. Now, I don't know whether the record is entirely clear with respect to this point, but while the agreement which was executed between Clayton & Company on the one hand, and the investors on the other, contains a provision to the effect that leases shall be made for only one year, actually leases were made for a longer period of time, is that not correct, after 1930?

A. That is right. I said we violated the agreement and rented for longer than one year, but I don't think there was a violation prior to 1930.

Q. And from time to time there were also renewals of [177] the one-year leases, is that correct?

A. You mean we gave a new lease to the same tenant that had been on before?

Q. Yes. A. Yes.

Q. Now, in addition to Mr. Fitzgerald, whom you mentioned as an employee you took over from Miller & Lux, you also had another employee whom you were regularly employing as a supervisor generally for the lands, isn't that correct?

A. Mr. Ayer.

(Testimony of Frazier O. Reed.)

Q. And what was his compensation?

A. \$200 a month, and he supplies his automobile and tires and gasoline. He is a part-time man only. He runs his own ranch and has usually between a thousand and two thousand head of cattle, and he just gives me a little help down there; saves tires and gasoline.

Q. Yes. And I think the total labor expense on the return for 1940 is some \$3900. The difference represents other temporary employees who were brought in to perform specific operations, is that correct?

A. Yes. But in that regard let me explain that Mrs. Curry sometimes includes in labor there cultivation, occasionally, or any unusual work she puts under labor. Don't get the impression that all of those people are—they [178] may be working with a tractor, they may be harrowing, they may be seeding, they may be cleaning up weeds, cleaning ditches and things.

If we had known this situation would have arisen we would have handled the account a little better, but we only carried it just as a debit and credit account the same as we would for you or anyone else. That is why it is so difficult to supply you with the information that you have asked for because it means that we have to go over the statements for nineteen years and dig it out, and it is not identified in any manner. It just runs along exactly like this account here.

(Testimony of Frazier O. Reed.)

Q. I am looking for an exhibit, one of respondent's exhibits, which I am unable to locate for the moment.

I merely want to ask you this:—well, I will make this statement: I think those exhibits show cultivation and harrowing and plowing and discing as a separate expense.

That has not been included in the item of labor from year to year, has it?

A. No, no, but——

Q. (Interposing): Yes. Well, I think the exhibit will speak for itself.

A. (Indicating): It is all set up there.

Q. Yes, that is it.

A. You have it all in your income tax all broken down [179] and itemized.

Q. Well, then, the presumption is in view of the fact that it is not listed there that that item of labor did not include ploughing in the 1940 return, did it.

A. Well, let me take a look and see if I have it. You have it broken down there before you.

Q. I want to call your attention specifically, for example, to the year 1927 and to Respondent's Exhibit "C", which shows an item "discing, cultivating and ploughing," of some \$14,684, and likewise in 1928——

A. (Interposing): That was when we were farming for wheat and barley to keep the land cultivated so that we could sell it.

Q. Yes. And then some separate items for the

(Testimony of Frazier O. Reed.)

year 1928 of some \$3,000, and for discing and for ploughing some \$5,000, and for harrowing some \$500. So I doubt whether any of those expenses were included in the item of labor in the returns.

A. I think labor, generally speaking, includes just labor, but it might include some labor done in connection with cleaning ditches.

Q. Now, would you state why title to the property was taken in the name of M. E. Thomas?

A. Because we had been in the habit of forming syndicates since about 1910. In 1911 we formed a syndicate of [180] four men, three of whom were members of the Bloomfield syndicate. One of those men died and his estate was in probate for over a year. In the meantime we lost several sales because we couldn't deliver title, so ever after that we took the title to syndicate property in the name of some of the women, some one of the women employed by us. That is the reason why we put the deeds for all of the Bloomfield lands in the name of M. E. Thomas.

Q. In other words, for operating convenience it worked out better that way, you were able to get all of your income——

A. (Interposing): Purely to avoid losses which might result in the death of one of the syndicate members.

Q. And I presume that was done pursuant to the paragraphs here in the agreement, itself expressly providing for taking title in the name of Thomas or any other party?

A. That is right.

(Testimony of Frazier O. Reed.)

Mr. Marcussen: For the record I would like to call your Honor's attention specifically to that part of the agreement, if the Court please.

It states:

"The operator is to take and hold title to said properties originally in the name of M. E. Thomas, but may take such title in the name of any other person, corporation, or concern, or in its own name, [181] and may have such title conveyed from time to time to other persons, corporations, or concerns, or otherwise conveyed or held as the operator may desire in trust for the said fourteen investors above referred to for the profitable resale thereof."

If your Honor please, that concludes the government's case on the evidence, and I don't presume at this time that you want any argument or a statement as to what respondent's position is.

Mr. Cullinan: I have one question on redirect, only one. Maybe we can make it very short, the answer to it.

Redirect Examination

By Mr. Cullinan:

Q. You said you violated the agreement respecting the terms of the lease after the depression began. Why?

A. In order to make longer than one year leases.

Q. Why did you have to make longer than one year leases?

A. To obtain any income, to obtain a tenant, and there were only a very few of those. I could give you the number, if that would be of any interest.

Q. In other words, you couldn't get tenants for one season leases? A. That is right.

Mr. Cullinan: That is all. [182]

The Witness: And those were very few, as I told you, I would say less than a half a dozen over the entire time.

The Court: I want to ask you one question.

Title to all of the land was held in the name of M. E. Thomas, and I would understand from that that it was not necessary to record any assignments of interests from one syndicate member to another.

When money was borrowed from the Bank of Italy were the individual syndicate members made liable in any way?

The Witness: No.

The Court: Who borrowed the money?

The Witness: M. E. Thomas signed the note, signed the notes and deeds of trust. I made the arrangements with the Bank of Italy for the \$335,000, and I made the arrangements with Miller & Lux for the \$250,000. And they both understood that they would only get the signature, or be supplied with the signature of M. E. Thomas.

The Court: That is all.

The Witness: The security which they had was excellent. In fact, the Bank of Italy did not take——

The Court: (Interposing) You don't have to extend your answer any further.

(Testimony of Frazier O. Reed.)

The Witness: All right. May I make a statement off the record? [183]

Mr. Cullinan: No. I suggest you——

The Court: (Interposing) No. I think you have finished answering that question.

The Witness: All right.

The Court: I would like to know, though, Mr. Cullinan, if there is any evidence on this point: Did these other persons ever participate in any way in making decisions or in managing the property?

Mr. Cullinan: I think on direct Mr. Reed testified that they did not, that they were not consulted, they never interfered with the operation, and he made the decisions, and as he met them occasionally he told this one or that one what was doing.

The Court: All right.

Mr. Marcussen: If your Honor please, may I ask two more questions?

The Court: All right.

Recross-Examination

By Mr. Marcussen:

Q. I want to clarify this point, Mr. Reed: With respect to the transfer of shares or interests in Bloomfield Ranch all of them were recognized, were they not, by Clayton & Company?

A. Yes, sir.

Q. All of the transfers were recognized? [184]

A. Yes, sir.

Q. And I think at one point you indicated there was some hesitation in transferring one——

(Testimony of Frazier O. Reed.)

A. (Interposing) No.

Q. In making one of the transfers, rather. Let me finish this, if you will.

And I wanted to ask you whether there is anything in the agreement which would authorize—the agreement of March 10, 1926, which would authorize refusal to recognize a transfer of the shares?

Mr. Cullinan: The agreement speaks for itself.

A. No, nor did it give anyone the right to demand that they be transferred.

Q. (By Mr. Marcussen): And I also ask you——

Mr. Cullinan: (Interposing) I think the record also shows that Clayton & Company just acknowledged receipt of notice of transfer.

The Witness: That is all we did.

Q. (By Mr. Marcussen): And you also made payments, did you, to the parties to whom the assignments were made? A. Yes.

Q. Payments were made after notice of the assignment was received to the assignees? [185]

A. Yes, sir.

Q. Then I want to ask you one more question: On the death of one of the original investors, was there a termination of the alleged partnership, Bloomfield Ranch? A. No.

Q. There was no re-organization on such occasions? A. No.

Q. Nor on any of the other transfers inter vivos?

A. No.

Mr. Marcussen: That is all.

Mr. Cullinan: That is all.

The Court: That concludes the hearing in this proceeding, except the record will be kept open to receive a stipulation of some facts.

The Clerk will now read the dates for the briefs under the present rule.

The Clerk: Original briefs will be due August 24th; reply briefs September 8th.

Mr. Cullinan: Original briefs August 24th?

The Clerk: That is correct.

Mr. Marcussen: I wonder, if your Honor please, whether, if it is agreeable to counsel, we could have an extension for the second briefs? I think that is August 24th, it is approximately fifteen days, is it?

The Clerk: From today? No, it is 45 days.

Mr. Marcussen: Yes, it is 45 days. No, I mean between August 24th and September 8th, could that be postponed another fifteen days by agreement with counsel, if it is all right?

The Court: What do you want? Do you want thirty days for the reply?

Mr. Marcussen: Thirty days for the reply.

The Court: Why?

Mr. Marcussen: Well, it would be convenient is all, unless it would disturb your Honor's calendar or consideration of the case.

The Court: I might say that Respondent's briefs are always late anyway these days. I don't think it makes much difference what date I set down. I am granting motions to extend time for briefs all the time.

Mr. Cullinan: If it is possible under the rule, we would like to have a little more time to file the open-

ing briefs, because it may be ten days or two weeks before we get the record.

Mr. Marcussen: That would be quite agreeable with me, if your Honor please.

Mr. Cullinan: In fact, we have all the law brief now. It is only a matter of being able to refer to pages of the record to sustain our statements respecting facts.

August 24th is all right for us. [187]

The Court: I am quite sure that you will receive the transcript in the time that you are supposed to receive it, which is ten days from the date of the trial.

Now, the rule as made covers that situation, and I think it is better to stick to the rule, and I may say that I have never refused a late brief, unless the situation were extreme, and if your brief is filed within a reasonable time after the date it is due, with a motion asking that it be received late, I will receive it late. But I know that Respondent's brief will be late. I don't know about Petitioners' brief. When Respondent's brief is late, of course, it throws out the dates for everybody. And we do have a great deal of difficulty at present in certain sections of the country. Perhaps, that won't be true here.

That concludes the hearing of this proceeding.

(Whereupon, at 5:15 p.m., Tuesday, July 10, 1945, the hearing was closed.)

[Endorsed]: Filed Aug. 7, 1945. [188]

PETITIONERS' EXHIBIT No. 1

\$50,000.00

San Jose, Cal., March 10, 1926.

This is to acknowledge receipt by the undersigned, James A. Clayton & Co., a corporation of San Jose, Cal., hereinafter called the "Operator," from J. P. Dorrance of San Jose, hereinafter called the "Investor," of the sum of Fifty Thousand (\$50,000.00) Dollars, which sum is so received by, and paid to, said corporation on the terms and conditions and for the purposes, as hereinafter set forth and not otherwise, to-wit:

The Operator is to use said sum, together with other sums contributed by thirteen other persons, who are also referred to herein as "Investors" and other sums borrowed or advanced by said Operator—the unpaid portions thereof, may be re-borrowed or renewed, and security given—in the purchase of certain lands and interests, in the counties of Santa Clara, San Benito and Santa Cruz, California, belonging to Miller & Lux, Inc., and consisting of approximately 27,000 acres of land, together with divers rights, appurtenances and easements as described in three deeds to M. E. Thomas dated March 3rd, 1926, and recorded March 10th, 1926, in Santa Clara, San Benito and Santa Cruz Counties, Cal.

The Operator is to take and hold title to said properties originally in the name of M. E. Thomas; but may take such title in the name of any other person, corporation or concern, or in its own name; and may have such title conveyed, from time to

time, to other persons, corporations or concerns, or otherwise conveyed or held, as the Operator may desire, in trust for the said 14 investors above referred to, for the profitable resale thereof.

The Operator may sell, convey, hold, lease for one season only, or in any otherwise deal with and treat said properties as the sole and absolute owner thereof in fee simple, and without let or hindrance from the Investor, or any of the Investors, less than the full number thereof, or any other person or concern, whatsoever. But may not exchange, encumber, nor lease except as above specified, nor sell trees, wood or improvements off from said property without the consent of the investors.

The Operator may, from time to time, incur such costs, expenses, and charges in connection with the acquiring, holding, renting, selling or protecting of said properties, as it may deem proper; and the fact of the Operator incurring such cost, expense or charge, shall conclusively establish the propriety and legality thereof.

The Operator shall keep true and accurate books of account, in which shall be set down, from time to time, all moneys paid out and charges, expenses and costs incurred in the premises, and all sales made and properties disposed of, and moneys or other things of value received by it in the premises.

Out of the moneys received from sales or renting or other sources of said properties, the Operator shall first retain for its own use and benefit, a commission of five per centum (5%) on the gross selling price of each parcel sold, [189] as sales are

made, and from the net proceeds of such sales, after deduction of its commissions, the Operator shall pay all costs, expenses, and charges paid or incurred by it in the premises, and all moneys advanced or borrowed by it, together with interest thereon.

From any residue of moneys remaining in the Operator's hands, after all the foregoing payments have been made, the Investor shall be entitled to have returned to him, at the same time, and in equal amounts, as are returned to the other Investors, the whole or such part of the said sum herein receipted for, as may, in the judgment of the Operator, be safely paid, without jeopardy to any remaining properties or assets, not yet converted into cash; but no Investor shall be entitled, as of right, to any payment or return, or repayment before said properties and the proceeds thereof, have been converted into cash, and all such commissions, debts, advances, costs, charges and expenses have been fully paid, provided, however, that upon the payment of the debts, taxes and charges accrued, such funds shall be distributed equally to said Investors whenever there shall be a net amount of \$7000 or more on hand.

When, as, and if all of said properties, and all properties, and all proceeds therefrom shall have been sold and converted into cash, and all such commissions, debts, advances, costs, charges and expenses shall have been fully paid, and all moneys advanced by the Investors shall have been fully repaid, all moneys, if any, then remaining in the hands of the Operator arising out of said transactions, and not applicable to any of the foregoing require-

ments, shall be, by said Operator, paid to and divided among the Investors, in equal shares to each of them, their heirs and assigns.

It is authorized, understood and agreed, however, that the Operator has charged, and is entitled to a commission of Fifty Thousand (\$50,000.00) Dollars for the negotiation, purchase and consummation of sale of said properties from Miller & Lux, Inc., to said M. E. Thomas, which is in addition to commissions to be credited to it for subsequent resales, and which shall be added to, and included in charges and expenses of the transactions herein provided for, and accounted as part of the original purchase price of said properties.

The Investor shall be entitled to have an account rendered to him by the Operator, of all transactions hereunder, on demand, but not more often than once each sixty days.

These presents are executed in duplicate by the Operator and the Investor, the day and year set out at the opening hereof, and shall be binding upon the successors, heirs, representatives and assigns of each of them.

JAMES A. CLAYTON & CO.,
By FRAZIER O. REED,
Its President.

W. S. CLAYTON,
Its Secretary.
Operator.

J. P. DORRANCE,
Investor. [190]

PETITIONERS' EXHIBIT No. 2

San Jose, California

April 30, 1941

This is to acknowledge that Willis Sherman Clayton, Jr., is now the owner of one-half of the undivided one-fourteenth interest in and to the balance of the assets, both real and personal, belonging to the Miller & Lux Syndicate as evidenced by the Receipt and Agreement dated March 10, 1926, between James A. Clayton & Co., as Operator, and W. S. Clayton, as Investor, a copy of which is attached hereto and made a part hereof, the same having been distributed to him by the Final Decree of Distribution in the Estate of Willis Sherman Clayton, Deceased, dated April 15, 1941.

[Corporate Seal]

JAMES A. CLAYTON & CO.,
By FRAZIER O. REID,
President.

San Jose, California

April 30, 1941

I hereby acknowledge that one-half of the undivided one-fourteenth interest in and to the balance of the assets, both real and personal, of the foregoing Syndicate was distributed to me by the Final

Decree of Distribution in the estate of Willis Sherman Clayton, Deceased, April 15, 1941.

WILLIS SHERMAN CLAYTON, JR.

San Jose, California

April 30, 1941

The undersigned as Operator named in said receipt and Agreement hereby accepts notice of the foregoing assignment.

[Corporate Seal]

JAMES A. CLAYTON & CO.,

By FRAZIER O. REED,

President. [191]

[Annexed agreement is identical with Petitioners' Exhibit 1 (pages 167-170) except the difference of the name of the investor.]

PETITIONERS' EXHIBIT No. 3

In consideration of the sum of Sixteen Thousand One Hundred Five (\$16,105.00) Dollars, lawful money of the United States of America, to us in hand paid by Florence G. Baldwin, the receipt whereof is hereby acknowledged, we hereby assign, grant, convey and transfer unto said Florence G. Baldwin all of our one-half interest in and to the undivided one-fourteenth interest in and to the balance of the assets, both real and personal belonging to the Miller & Lux Syndicate as evidenced by the Receipt and Agreement dated March 10, 1926,

between James A. Clayton & Co., as Operator and W. S. Clayton, as Investor, a copy of which is attached hereto and made a part hereof.

The interest hereby assigned, granted, conveyed and transferred to said Florence G. Baldwin was distributed to James Bradley Clayton by Final Decree of Distribution in the Estate of Willis Sherman Clayton, Deceased, dated April 15, 1941.

In Witness Whereof, the undersigned have hereunto subscribed their names as of April 30, 1941.

J. B. CLAYTON.

OLIVE A. CLAYTON.

Witnesses:

E. B. DONOVAN.

M. G. BOWDEN.

San Jose, California

April 30, 1941.

The undersigned, as Operator named in said Receipt and Agreement, hereby accepts notice of the foregoing assignment.

JAMES A. CLAYTON & CO.,

By FRAZIER O. REED,

President. [194]

[Annexed agreement is identical with Petitioners' Exhibit 1 (pages 167 to 170) except the difference of the name of the investor.]

PETITIONERS' EXHIBIT No. 4

In consideration of the sum of Twenty-two Thousand Three Hundred Nine and 68/100 (\$22,309.68) Dollars, lawful money of the United States of America, to me in hand paid by James A. Clayton & Co., the receipt whereof is hereby acknowledged, I hereby assign, grant, convey and transfer unto said James A. Clayton & Co. all of my one-half interest in and to the undivided one-fourteenth interest in and to the balance of the assets, both real and personal, belonging to the Miller & Lux Syndicate as evidenced by the receipt and agreement dated March 10, 1926, between James A. Clayton & Co. as Operator, and W. S. Clayton as Investor, a copy of which is hereto attached and made a part hereof.

The interest hereby assigned to said James A. Clayton & Co. was heretofore assigned by J. B. Clayton and Olive A. Clayton, his wife, to Florence G. Baldwin by Assignment dated April 30, 1941.

In Witness Whereof, the undersigned has hereunto subscribed her name as of June 9, 1941.

FLORENCE G. BALDWIN.

Witnesses:

M. R. GRAGG.

ANN L. LAULESS.

San Jose, California

June 9, 1941

The undersigned, as Operator named in said Receipt and Agreement, hereby accepts notice of the foregoing assignment.

JAMES A. CLAYTON & CO.,

By J. B. CLAYTON,

Vice President.

EXPLANATION

In consideration of this Assignment an adjustment of \$6204.68 was made with Mrs. Baldwin on the commission due from the sale to Elmer C. von-Glahn affecting land in Kings County. Said land is inundated and there is little likelihood of any collection being made for several years.

This Assignment affects one-half of one-fourteenth interest in the Miller & Lux Syndicate Agreement originally owned by W. S. Clayton, now deceased, and was appraised at \$16,105.00 for the Estate of said W. S. Clayton.

[Annexed agreement is identical with Petitioners' Exhibit 1 (pages 167 to 170) except the difference of the name of the investor.]

PETITIONERS' EXHIBIT No. 5

For value received, the receipt whereof is hereby acknowledge, I, George H. Osen, hereby assign, grant, convey and transfer unto myself, the said George H. Osen, and to my son, George A. Osen, in joint tenancy, and to the survivor of us, all of my undivided one-fourteenth interest in and to the balance of the assets, both real and personal, belonging to the Miller & Lux Syndicate as evidenced by the Receipt and Agreement dated March 10, 1926, between James A. Clayton & Co. as Operator

and George H. Osen as Investor, a copy of which is attached hereto and made a part hereof.

In Witness Whereof, I have hereunto subscribed my name February 17, 1941.

GEORGE H. OSEN.

Witnesses:

FRAZIER O. REED.

J. B. CLAYTON.

State of California,
County of Santa Clara—ss.

On this 18th day of February in the year 1941, before me, E. B. Donovan, a Notary Public in and for the County of Santa Clara, State of California, residing therein, duly commissioned and sworn, personally appeared George H. Osen, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal at my office in said County of Santa Clara, the day and year in this certificate first above written.

[Seal] E. B. DONOVAN,
Notary Public in and for the County of Santa Clara,
State of California.

San Jose, California
February 17, 1941

I hereby ratify, approve and confirm the fore-

going Assignment and agree to be bound by the terms of said Receipt and Agreement.

GEORGE A. OSEN.

San Jose, California

February 17, 1941

The undersigned, as Operator named in said Receipt and Agreement, hereby accepts notice of the foregoing Assignment from George H. Osen to George H. Osen and George A. Osen, in joint tenancy.

JAMES A. CLAYTON & CO.,

By FRAZIER O. REED,

President. [200]

[Annexed agreement is identical with Petitioners' Exhibit 1 (pages 167 to 170) except the difference of the name of the investor.]

PETITIONERS' EXHIBIT No. 6

In consideration of \$28,550.00 to me in hand paid by Arthur D. Curtner, the receipt whereof is hereby acknowledged, I hereby sell, assign and set over unto said Arthur D. Curtner, an undivided one-half of all my right, title and interest in and to the receipt and agreement for Fifty Thousand (\$50,000.00) Dollars dated March 10th, 1926, and entered into by James A. Clayton & Co. as Operator and Thos. Scoble, as Investor, a copy of which said agreement is attached hereto and made a part hereof, including all my right, title and interest in

and to all of the real and personal property, described in said agreement, as well as all money, notes, mortgages, trust deeds, contracts of sale and agreements of every kind which said Operator may have accepted for such portions of said real and personal property as has been heretofore sold or contracted to be sold and this sale is made subject to said agreement and subject to all of the acts of James A. Clayton & Co., the Operator named therein and of said M. E. Thomas mentioned in said agreement.

In Witness Whereof. I have hereunto subscribed by name this 13th day of December A.D., 1927.

THOS. SCOBLE.

I hereby ratify, approve and confirm the foregoing sale and agreement.

ALICE G. SCOBLE,

By THOMAS SCOBLE,

Her Attorney-in-Fact.

I hereby agree to comply with all of the terms and conditions contained in said receipt and in said agreement [203] therein referred to and hereby assume one-half of all of Thos. Scoble's responsibility under the same, or either of them, whether already accrued or which may hereafter accrue.

ARTHUR D. CURTNER.

In consideration of \$14,275.00 to me in hand paid by Harry H. Fitch, the receipt whereof is hereby acknowledged, I hereby sell, assign and set over unto said Harry H. Fitch, an undivided one-fourth of all my right, title and interest in and to the

receipt and agreement for Fifty Thousand (\$50,000.00) Dollars dated March 10th, 1926, and entered into by James A. Clayton & Co. as Operator and Thos. Scoble, as Investor, a copy of which said agreement is attached hereto and made a part hereof, including all my right, title and interest in and to all of the real and personal property, described in said agreement, as well as all money, notes, mortgages, trust deeds, contracts of sale and agreements of every kind which said Operator may have accepted for such portions of said real and personal property as has been heretofore sold or contracted to be sold and this sale is made subject to said agreement and subject to all of the acts of James A. Clayton & Co., the Operator named therein and of said M. E. Thomas mentioned in said agreement.

In Witness Whereof, I have hereunto subscribed my name this 13th day of December A. D. 1927.

THOS. SCOBLE.

I hereby ratify, approve and confirm the foregoing sale and agreement.

ALICE G. SCOBLE,

By THOMAS SCOBLE,

Her Attorney-in-Fact.

I hereby agree to comply with all of the terms and conditions contained in said receipt and in said agreement therein [205] referred to and hereby assume one-fourth of all of Thos. Scoble's responsibility under the same, or either of them, whether already accrued or which may hereafter accrue.

HARRY H. FITCH.

In consideration of \$14,275.00 to me in hand paid by A. Leroy Parkinson, the receipt whereof is hereby acknowledged, I hereby sell, assign and set over unto said A. Leroy Parkinson, an undivided one-quarter of all my right, title and interest in and to the receipt and agreement for Fifty Thousand (\$50,000.00) Dollars dated March 10th, 1926, and entered into by James A. Clayton & Co. as Operator and Thos. Scoble as Investor, a copy of which said agreement is attached hereto and made a part hereof, including all my right, title and interest in and to all of the real and personal property, described in said agreement, as well as all money, notes, mortgages, trust deeds, contracts of sale and agreements of every kind which said Operator may have accepted for such portions of said real and personal property as has been heretofore sold or contracted to be sold and this sale is made subject to said agreement and subject to all of the acts of James A. Clayton & Co., the Operator named therein and of said M. E. Thomas mentioned in said agreement.

In Witness Whereof, I have hereunto subscribed my name this 13th day of December A. D. 1927.

THOS. SCOBLE.

I hereby ratify, approve and confirm the foregoing sale and agreement.

ALICE G. SCOBLE,

By THOMAS SCOBLE,

Her Attorney-in-Fact.

I hereby agree to comply with all of the terms and conditions [207] contained in said receipt and in said agreement therein referred to and hereby assume one-quarter of all of Thos. Scoble's responsibility under the same, or either of them, whether already accrued or which may hereafter accrue.

A. LEROY PARKINSON.

[Annexed agreements are identical with Petitioners' Exhibit 1 (pages 167 to 170) except the difference of the names of the investors]

PETITIONERS' EXHIBIT No. 7

[Letterhead San Jose Hardware Co.]

San Jose, California

August 10th, 1928

James A. Clayton & Co.
34 West Santa Clara St.
San Jose, California.

Gentlemen:—

We observe you still carry our interest in the M. & L. Syndicate in the name of W. L. Holmes. When we incorporated our Attorneys Rea & Caldwell should have had this transferred to San Jose Hardware Co.

Kindly change this on your books. By so doing you will oblige.

Yours truly,

SAN JOSE HARDWARE CO.,

A. E. HOLMES,

Pres.

W. L. HOLMES,

AEH:DI [213]

Secty.

San Jose, California

October 17th, 1928

James A. Clayton & Co.,
34 W. Santa Clara St.,
San Jose, Calif.

Gentlemen:—

You are hereby authorized and instructed to transfer and set over unto the San Jose Hardware Company all my right, title and interest in and to the M. E. Thomas (Miller & Lux, Incorporated) Syndicate.

The transfer should have been made as of August 10th, 1928.

W. L. HOLMES. [214]

PETITIONERS' EXHIBIT No. 8

398 South 15th Street
San Jose, California
July 15th, 1931

James A. Clayton Company,
San Jose, California.

Dear Frazier:

Reference Miller and Lux Syndicate:

Your records will show that for a one fourteenth interest I paid to you \$40,000 and Mr. A. A. Hapgood, \$10,000 and your disbursements have been on that basis, that is, four fifths of one fourteenth interest have been paid to me and one fifth to Mr. Hapgood.

However, your books apparently do not show Mr. Hapgood in the matter and your statements do show a full one fourteenth of what you term dividends as paid to me.

This is to instruct, request and urge that you change your accounts so as to show that Mr. Hapgood *has one fifth of one fourteenth interest in the Syndicate and that you make future disbursements in accordance.

Kindly acknowledge and thank you for your prompt compliance.

Yours truly,

E. SHILLINGSBURG.

*& of course, that I have four fifths of a fourteenth interest.

SHILLY.

P.S. Isn't there a refund due us from the Internal Rev. Dept. for one of the years we overpaid? [215]

PETITIONERS' EXHIBIT No. 9

“Personal San Jose, Calif., August 14, 1931

Mr. Frazier O. Reed, President

Jas. A. Clayton & Co.

34 West Santa Clara Street

San Jose, Calif.

Dear Mr. Reed:

Mr. Shillingsburg advises that he has had a talk with you in reference to showing my name in the records of the Miller and Lux Syndicate as owner of one fifth of one fourteenth portion, and that you advised him that this could only be done by considerable red tape.

If this is the case I am wondering what complications would arise with the demise of either Mr. Shillingsburg or myself, and if we would not be involved in considerable trouble and expense.

I was disappointed at the first that my name was not included especially after you did include Mr. Fitch who paid in about the same as myself.

As it will probably be some time before this Syndicate will be terminated I will appreciate it very much if you will arrange to make the change in the records at your earliest convenience.

Yours truly,

A. A. HAPGOOD.

(Letterhead of Southern Pacific Co. omitted)

PETITIONERS' EXHIBIT No. 10

In consideration of Ten Thousand (\$10,000.00) Dollars to me in hand paid by A. A. Hapgood, the receipt whereof is hereby acknowledged, I hereby sell, assign and set over unto said A. A. Hapgood an undivided one-fifth of all my right, title and interest in and to the receipt and agreement for Fifty Thousand (\$50,000.00) Dollars dated March 10th, 1926 and entered into by James A. Clayton & Co. as Operator and E. Shillingsburg, as Investor, a copy of which said agreement is attached hereto and made a part hereof including an undivided one-fifth of all my right, title and interest in and to all of the real and personal property, described in said agreement, as well as all money, notes, mortgages, trust deeds, Contracts of Sale and Agreements of every kind which said Operator may have accepted for such portions of said real and personal property as may have been heretofore sold or contracted to be sold and this sale is made subject to said agreement and subject to all of the acts of James A. Clayton & Co., the Operator named therein and of said M. E. Thomas mentioned in said agreement.

In Witness Whereof, I have hereunto subscribed by name this 26th day of May, A. D. 1926.

E. SHILLINGSBURG.

I hereby ratify, approve and confirm the foregoing sale and agreement.

NELLIE SHILLINGSBURG.

I hereby agree to comply with all of the terms and conditions [217] contained in said receipt and in said agreement therein referred to and hereby assume one-fifth of all of E. Shillingsburg's responsibilities under the same, or either of them, whether already accrued or which may hereafter accrue.

A. A. HAPGOOD.

James A. Clayton & Co. is hereby requested to take notice that I have on this 26th day of May, 1926, sold, assigned and set over unto A. A. Hapgood an undivided one-fifth of all my right, title and interest in and to the receipt and agreement for Fifty Thousand (\$50,000.00) Dollars dated March 10th, 1926 and entered into by James A. Clayton & Co., as Operator, and E. Shillingsburg, as Investor, which said agreement affects those certain lands and interests, in the Counties of Santa Clara, San Benito, and Santa Cruz, California, purchased by me and thirteen other syndicate members in the name of M. E. Thomas from Miller & Lux, Incorporated.

E. SHILLINGSBURG.

I hereby ratify, approve and confirm the foregoing notice.

NELLIE SHILLINGSBURG.

[Annexed agreement is identical with Petitioners' Exhibit 1 (pages 167 to 170) except the difference of the name of the investor.]

Statement of Gross and Net Income from Farming and Rents 1926 to 1940, Inclusive, as
Shown by Bloomfield Ranch Partnership Returns of Income

Year	Farming A			Rents B		
	Gross Receipts	Expenses	Profit or Loss	Rents	Commissions	Net
1926.....	\$ 1,562.94	\$ 10,877.77	\$ 9,314.83	\$ 34,041.00	\$ 1,327.60	\$ 32,713.40
1927.....	7,617.02	32,519.98	24,902.96			4,842.15
1928.....	23,131.31	36,867.36	13,736.05	14,788.17	752.98	14,035.19
1929.....	30,655.90	39,636.07	8,980.17	32,304.69	1,602.75	30,701.94
1930.....	28,769.77	24,358.75	4,411.02	35,870.31	2,069.87	33,800.44
1931.....	14,325.72	12,740.50	1,585.22	27,977.37	1,398.85	26,578.52
1932.....	1,840.52	13,418.49	11,577.97	25,270.24	*4,080.39	21,189.85
1933.....	3,086.20	10,085.39	6,999.19			33,825.54
1934.....	21,500.80	9,414.81	12,085.99	39,008.90	*3,194.72	35,814.18
1935.....	4,356.02	11,533.66	7,177.64			34,487.13
1936.....	8,790.98	11,768.27	2,977.29	58,929.21	2,922.81	56,006.40
1937.....	7,108.59	18,559.18	11,450.59	52,695.95	2,655.91	*50,140.04
1938.....	5,825.36	12,006.74	6,181.38	39,142.97	1,957.01	37,185.96
1939.....	8,182.50	13,435.72	5,253.22	45,104.53	2,256.93	42,847.60
1940.....	8,806.07	10,733.04	1,926.97	50,929.57	2,546.29	48,383.28
	\$175,559.70	\$267,955.73	\$ 92,396.03	\$456,062.91	\$ 26,766.11	\$502,551.62
			(Net Loss)	Less Loss on Farming		92,396.03

*Other Items

[Italic figures—Red on original copy.]

\$410,155.59
Less Taxes Paid per Sheet attached 224,722.76
\$185,432.83

Statement of Interest Received, Profits from Sale of Real Estate, Miscellaneous Items and Total Gross Income as
Shown by Bloomfield Ranch Partnership Returns of Income

Year	D		E	
	C Interest	Profit from Sale of Real Estate	Miscellaneous	Total
1926.....	\$ 10,141.84	\$ 61,268.38	\$ 2,989.83	\$ 97,798.62
1927.....	14,150.37	6,678.23	2,954.52	3,722.31
1928.....	14,338.68	44,190.88	1,996.13	60,824.83
1929.....	20,168.27	149,106.12	2,889.84	193,886.00
1930.....	17,408.08	53,939.75	3,638.62	113,197.91
1931.....	14,672.86	3,372.27	1,344.50	47,553.37
1932.....	10,406.38	7,644.66	951.57	13,325.17
1933.....	13,948.55		158.31	40,933.21
1934.....	9,306.98	607.91	1,012.95	57,612.19
1935.....	11,999.98	127.36	480.45	39,917.28
1936.....	12,164.27	733.07	420.14	66,346.59
1937.....	3,284.35		327.63	42,301.43
1938.....	2,121.76	272.08	88.55	33,486.97
1939.....	1,247.19	331.36	280.93	39,453.86
1940.....	1,043.29			47,499.60
	\$156,402.85	\$311,766.93	\$ 19,533.97	\$897,859.34
		Less Taxes Paid.....		224,722.76

\$673,136.58

Statement of Taxes Paid During 1926 to 1940,
Inclusive, as Shown by Bloomfield Ranch Part-
nership Returns of Income

Year	
1926	\$ 30,147.17
1927	24,782.72
1928	20,189.50
1929	20,993.33
1930	24,862.85
1931	8,054.96
1932	14,174.46
1933	10,130.24
1934	8,713.31
1935	12,516.44
1936	8,618.05
1937	10,659.98
1938	9,604.41
1939	10,770.33
1940	10,505.01
Total	\$224,722.76

PETITIONERS' EXHIBIT No. 13

Investment and Sales

Sales to and including 1940..... \$1,474,243.06

Purchase Price

Investors contributed	\$700,000.00	
Borrowed from Bank of Italy	350,000.00	
Borrowed from Miller & Lux	235,000.00	1,285,000.00

Gain to and including 1940.....	\$ 189,243.06
Sales in 1942.....	10,850.00
Sales in 1942.....	3,000.00
Sales in 1943.....	20,435.00
Sales in 1944.....	318,315.00

Total Gain 1926-1944, inclusive.... \$ 541,843.06

1/14th equal \$ 38,703.07 plus

About 1,500 acres remain unsold.



ACCEPTED

UNITED STATES

PARTNERSHIP RETURN OF INCOME

1940

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1940

 or fiscal year beginning _____, 1940, and ended _____, 1941
 (File this return not later than the 15th day of the 1st month following the close of the taxable year)

PRINT FULLY NAME AND BUSINESS ADDRESS OF THE ORGANIZATION

BLOOMFIELD RANCH

34 WEST SANTA CLARA STREET

SAN JOSE SANTA CLARA CALIFORNIA

Business or Profession RANCH

Do Not Use This Space

File Code

Serial No.

District

(Date Received)

RECEIVED

 MAR 7 1941
 COLLECTOR
 OF INT. REV.
 FIRST DIST. CALIF.

GROSS INCOME

Item and

Exemption No.

1. Gross receipts from business or profession	\$ 8806.07
2. Less cost of goods sold:	
(a) Inventory at beginning of year	\$
(b) Merchandise bought for sale	
(c) Cost of labor, supplies, etc.	10733.04
(d) Total of lines (a), (b), and (c)	\$ 10733.04
(e) Less inventory at end of year	
3. Gross profit (or loss) from business or profession (Item 1 minus item 2)	\$ 1928.97
4. Income (or loss) from other partnerships, syndicates, pools, etc. (State separately name, address, and amount):	
5. Interest on bank deposits, notes, corporation bonds, etc. (except interest to be reported in item 6) \$1098.15 Collection Expense \$54.86	
6. Interest on tax-free covenant bonds upon which a Federal income tax was paid at source	
7. Interest on Government obligations, etc. (From Schedule A)	
8. Rents \$50929.57 Less Commissions \$2546.29	
9. Royalties	
10. Net gain (or loss) from sale or exchange of property other than capital assets (From Schedule B)	
11. Dividends	
12. Other income (State nature of income)	
13. Total income in Items 3 to 12 (Enter net taxable income in Schedules A and C)	\$ 47499.60
14. Salaries and wages (do not include compensation for partners)	
15. Rent	1382.94
16. Repairs	
17. Interest on indebtedness (Caption in Schedule D)	10505.01
18. Taxes (Caption in Schedule C)	
19. Losses by fire, storm, shipwreck, or other casualty, or theft (Caption schedule, see Instruction 19)	
20. Bad debts (Caption in Schedule D)	4092.60
21. Depreciation (Caption in Schedule E)	
22. Depletion of mines, oil and gas wells, timber, etc. (Caption schedule, see Instruction 22)	
23. Other deductions authorized by law (Caption in Schedule F)	
24. Total deductions in Items 14 to 23	
25. Ordinary net income (Item 13 minus item 24)	
26. Net short-term capital gain (or loss) (From line 1, column 4, Summary, Schedule H)	
27. Net long-term capital gain (or loss) (From line 2, column 4, Summary, Schedule H)	

NOTE-In order that this return may be accepted as meeting the requirements of the Internal Revenue Code, the data called for herein must be set forth fully.

Schedule A.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction 7)

Page 1

1. Obligations or securities	2. Amount owned at end of year	3. Interest received or accrued during the year
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	\$	\$
(b) Obligations issued under the Federal Farm Loan Act, or under such Act as amended	\$	\$
(c) Obligations of the United States issued on or before September 1, 1917	\$	\$
(d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness	\$	\$
(e) United States Savings Bonds and Treasury Bonds	\$	\$
(f) Obligations of instrumentalities of the United States (other than obligations to be reported on line (b) above)	\$	\$
(g) Total of lines (c) and (f), column 3 (enter as item 7, page 1)	\$	\$

Schedule B.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS. (See Instruction 16)

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expenses of sale and cost of improvements subsequent to acquisition at March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (furnish details)	7. Gain or loss (column 3 plus columns 5 minus the sum of columns 4 and 6)
		\$	\$	\$	\$	\$
		\$	\$	\$	\$	\$
		\$	\$	\$	\$	\$
Total net gain (or loss) (enter as item 10, page 1)						\$

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items:

If any of the above items were acquired by you other than by purchase, explain fully how acquired:

Schedule C.—TAXES. (See Instruction 18)

Name	Amount
	\$
	\$
	\$
Total (enter as item 16, page 1)	\$

Schedule D.—BAD DEBTS. (See Instruction 20)

1. Taxable year	2. Net losses reported	3. Sales on account	4. Bad debts charged off by organization if no reserve is carried on books	If organization carried a reserve—	
				5. Gross amount added to reserve	6. Amount charged against reserve
1937	\$	\$	\$	\$	\$
1938	\$	\$	\$	\$	\$
1939	\$	\$	\$	\$	\$
1940	\$	\$	\$	\$	\$

NOTE.—Check whether deduction claimed represents worthless debts charged off ☐, or is an addition to a reserve ☐.

Schedule E.—DEPRECIATION. (See Instruction 21)

1. Kind of property (if buildings, state character of building)	2. Date acquired	3. Cost or other basis (Do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in computing depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
		\$	\$	\$	\$			\$
		\$	\$	\$	\$			\$
		\$	\$	\$	\$			\$
Total (enter as item 21, page 1)								\$

Schedule F.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 17 AND 23

1. Item No.	2. Explanation	3. Amount	1. Item No. (continued)	2. Explanation (continued)	3. Amount (continued)
		\$			\$
		\$			\$
		\$			\$

Schedule G.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE A. (See Instruction 1)

1. Source of income	2. Nature of income	3. Amount
		\$
		\$
		\$



BLOOMFIELD RANCH

1940

SCHEDULE 2 (c)

Labor	\$ 3934.89
Commissions	398.18
Insurance	317.85
Miscellaneous Expense	375.89
Light and Power	108.42
Drainage	1200.00
Supplies	4023.11
Tractor Hire	296.25
Hauling	<u>78.45</u>
	\$10733.04

SCHEDULE F DEPRECIATION

KIND OF PROPERTY	DATE ACQUIRED	COST	DEPRECIATION ALLOWED	BALANCE COST	REMAINING LIFE	DEPRECIATION 1940
Pumping Plant and Pumps	Various	\$7439.96	\$3135.78	\$4304.18	Various	\$ 743.99
Ditches	Feb. 1938	1031.38	75.69	955.69	23 - 2	41.25
Wells	Various	17121.91	11129.92	5992.09	Various	1525.35
Buildings	Various	27068.99	18037.17	9031.82	Various	1333.69
Pipe Line	May 1935	981.04	224.76	756.28	15 1/2 yr.	49.05
Power Lines, Motors, Equipment, Etc.	Various	3416.90	1534.17	1882.73	Various	341.63
Surface Pipe	June 1940	646.84		646.84	5 yrs.	<u>64.68</u>
						\$4099.64

BLOOMFIELD RANCH

1940

PARTNERS' SHARE OF INCOME

NAME	ADDRESS	PART	AMOUNT
(1) Florence G. Baldwin ✓	Rancho Matilija, R. R. No. 2, Ojai, California.	1/14	\$ 2,250.96
(2) J. D. Chase ✓	Commercial Building, San Jose, California.	1/14	2,250.86
(3) Anna B. Clayton, Executrix	171 Sunol Street, San Jose, California.	1/14	2,250.86
(4) James A. Clayton & Company	34 W. Santa Clara Street, San Jose, California.	1/14	2,250.86
(5) Arthur D. Curtner ✓	c/o Richmond Chase Company, San Jose, California.	3/28	3,376.28
(6) Edith K. Dorrance	629 Hicks Avenue, San Jose, California.	1/14	2,250.86
(7) Rose L. Fitch and Margaret F. Coykendall	831 Whipple Avenue, Redwood City, California.	1/56	562.72
(8) A. A. Hapgood	48 South 16th Street, San Jose, California.	1/70	450.17
(9) H. S. Hersman	Gilroy, California.	1/14	2,250.86
(10) George H. Osen ✓	230 North First Street, San Jose, California.	1/14	2,250.86
(11) A. Leroy Parkinson ✓	158 South 8th Street, San Jose, California.	5/56	2,813.56
(12) Estate A. R. Patrick ✓	c/o S. C. Cornett, Executor, Salinas National Bank Bldg., Salinas, California.	1/14	2,250.86
(13) San Jose Hardware Company ✓	62 West San Fernando Street, San Jose, California.	1/14	2,250.86
(14) Nellie Shillingsburg ✓	398 South 15th Street, San Jose, California.	4/70	7,000.00
(15) Ellen Weinstein, Executrix of the Estate of Samuel Weinstein, Deceased ✓	1565 Green Street, San Francisco, California.	1/14	

<p>1. Name and address of each person (Do not omit nonresident alien) Where cause of payment or transfer is listed in another column, specify date If the full name of any person was not directed to be included, the percentage of those directed must be stated</p>	<p>2. Ordinary net income less taxes on Government obli- gations, etc. (Item 21, page 1, minus item 7, page 1, and amounts included in item 12, page 1)</p>	<p>3. Net short-term gains (or loss) from sale or exchange of capital assets (from Sched- ule H, Summary, line 1, col- umn 4)</p>	<p>4. Net long-term gains (or loss) from sale or exchange of capital assets (from Sched- ule H, Summary, line 2, col- umn 4)</p>
<p>6</p>	<p>\$</p>	<p>\$</p>	<p>\$</p>
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<p>6</p>	<p>\$</p>		

[illegible]

1. Date of organization 1926
2. Nature of organization (partnership, syndicate, pool, joint venture, etc.) Partnership
3. Was a return filed for preceding year? Yes If so, to which collector's office was it sent? First California
4. Check whether this return was prepared on the cash ☒ or accrual ☐ basis.
5. State whether inventories at the beginning and end of the taxable year were valued at (a) cost, or (b) cost or market, whichever is lower

If any other basis is used, attach statement describing basis full state why used and the date inventory was last reconciled with stock.

6. Did the organization at any time during the taxable year own directly or indirectly any stock of a foreign corporation or of a personal holding company, as defined in section 501 of the Internal Revenue Code? (Answer "Yes" or "No"). No
If answer is "Yes," attach schedule required by Instruction 10.
7. Was return of information on Forms 1096 and 1099 filed for calendar year 1940? (See Instruction 11). Yes

AFFIDAVIT (See Instruction D)

AFFIDAVIT (See Instruction D)
I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief is a true, correct, and complete return, made in good faith, for the accounting period stated, pursuant to the Internal Revenue Code and the regulations issued under authority thereof.

Subscribed and sworn to before me this 4th day of March, 1941

E B Lanyon

(If this return was prepared for you by some other person, the following affidavit must be executed)

AFFIDAVIT (See Instruction D)

I/we swear (or affirm) that I/we prepared this return for the organization named herein and that the return (including schedules and statements) is a true, correct, and complete statement of all the information respecting the income of the person/organization named herein, and the return was prepared of which I/we have any knowledge.

Subscribed and sworn to before me this

25 day of February 1941

Francis Langdon
(Signature and title of officer administering oath)



RESPONDENT'S EXHIBIT "B"

Breakdown of "Gross Receipts," "Supplies" and
"Labor," items appearing on the 1940 return
of Bloomfield Ranch

Bloomfield Ranch—1940

Supplies

Seed	\$1,750.00
Manure	169.71
Liq. Phos. Acid and Sul. Amn.....	518.97
Gaviota Fruiting	160.81
Fertilizer	1,205.56
Squirrel Poison	21.75
Fruitone	5.15
Tomato Plants	30.00
Tomato Seed	30.00
Rock Fill	9.79
Chappell and Sons.....	59.75
Paint	18.46
Martin Hardware	43.16
	<hr/>
	\$4,023.11
	<hr/>

Labor

J. E. Ayer	\$2,400.00
F. Silacci	13.00
Bradley Ranch (for drying prunes).....	22.50
Kumagai	99.90
M. Galer	24.30
Donohue	91.19
H. O. Galer	343.40
W. Silacci	157.50
Lavers	5.00
J. H. Silva	225.79
H. Allemand	132.00
Bontodelli	27.36
Wolfe	25.47
Clearing and Burning Carnadero Creek.....	214.50
Paid to Butterfield and Ayer for casual labor.....	152.98
	<hr/>
	\$3,934.89
	<hr/>

Income

Sale of seed—fenugreek.....	\$ 832.00
1939 Beet Bonus—United States Government.....	6,687.97
Prunes—United States Government.....	820.20
Sale of hay	167.21
United States Government Soil Conservation — 1939 Leases	252.57
1938 Prunes	18.12
Sale of straw.....	28.00
	<hr/>
	\$8,806.07
	<hr/>

RESPONDENT'S EXHIBIT "C"

Statement of Farming Expenses for 1927 to 1930,
Inclusive, and for 1937, as Shown by Bloomfield
Ranch Partnership Returns of Income

Year	Expenses	Total
1927	General Expense	\$ 429.09
	Power	870.56
	Insurance	698.60
	Labor	5,982.93
	Supplies	2,297.22
	Squirrel poison	147.32
	Discing, cultivating & plowing..	14,684.12
	Hauling	1,327.12
	Harvesting	593.00
	Cleaning Barley	345.55
	Sowing	64.00
	Pruning	318.00
	Board for Help	97.97
	Threshing	3,912.40
	Telephone	45.30
	Seed	705.90
		<hr/>
		\$32,519.98

Year	Expenses		Total
1928	Labor	\$ 9,866.52	
	Telephone and General Expenses	312.20	
	Insurance	1,398.36	
	Commission	1,030.78	
	Discing	3,179.27	
	Plowing	5,188.57	
	Sacks and Bags.....	2,375.38	
	Seeding	409.75	
	Pruning	300.00	
	Harrowing	515.73	
	Straw	1,050.00	
	Spray	128.30	
	Binding	701.80	
	Threshing	2,589.00	
	Harvesting	707.50	
	Board for Help	422.25	
	Seed	2,166.30	
	Power	406.71	
	Supplies and Repairs	750.14	
	Squirrel Poison	66.78	
	Attorney fees	50.00	
	Gravel	196.00	
	Recleaning Seeds	2,058.97	
	Hauling	997.05	\$36,967.36
1929	General Expenses	\$ 266.25	
	Telephone	168.65	
	Labor—plowing, discing, etc.....	24,490.84	
	Power	289.17	
	Insurance	3,595.07	
	Commission	1,437.53	
	Hauling	1,584.15	
	Seed	1,923.99	
	Supplies	4,933.19	
	Repairs	947.23	\$39,636.07
1930	Labor	\$11,061.15	
	Insurance	1,324.90	
	Supplies	3,629.41	
	General Expenses	698.40	
	Commissions	1,530.74	
	Light and Power.....	318.15	
	Automobile Expense	216.00	
	Attorney fees	5,580.00	\$24,358.75

Year	Expenses		Total
1937	Light and Power.....	\$ 173.70	
	Ranch Supplies	3,305.23	
	Chamber of Commerce dues.....	50.00	
	Hauling	295.60	
	Commissions	330.43	
	General Expense	352.98	
	Insurance	900.08	
	Labor	13,151.16	\$18,559.18

RESPONDENT'S EXHIBIT "D"

Statement showing total Disbursements to Investors

To each unit of the Bloomfield Group there was returned the original capital invested and the profits arising from sales, rents, farming operations, etc., as follows (Letter Clayton & Co., May 31, 1945):

Date of Distribution	Amount of Distribution
January 19, 1928.....	\$4,000.00
August 7, 1928	1,500.00
January 3, 1929.....	2,000.00
April 23, 1929.....	1,000.00
July 3, 1929.....	4,000.00
September 30, 1929.....	1,000.00
November 8, 1929.....	6,000.00
February 18, 1930.....	7,500.00
August 22, 1930.....	2,000.00
December 1, 1930.....	1,500.00
December 30, 1930.....	750.00
January 16, 1931.....	2,000.00
March 30, 1931.....	1,000.00
September 25, 1931.....	1,000.00
March 4, 1932.....	2,000.00
January 15, 1934.....	2,000.00
February 27, 1935.....	3,000.00
February 17, 1935.....	2,000.00
February 12, 1936.....	7,000.00
November 17, 1936.....	2,500.00
December 18, 1936.....	2,000.00
June 28, 1937.....	2,000.00

Date of Distribution	Amount of Distribution
December 9, 1937.....	\$ 2,000.00
February 8, 1938.....	2,000.00
December 28, 1938.....	1,000.00
March 7, 1939.....	500.00
December 28, 1939.....	2,000.00
December 17, 1940.....	2,000.00
December 27, 1941.....	2,000.00
December 22, 1942.....	2,000.00
August 24, 1943.....	2,000.00
December 29, 1944.....	25,000.00

Total	\$98,250.00
Total paid to 14 Units.....	\$1,375,500.00

RESPONDENT'S EXHIBIT "F"

Items shown in column headed "Miscellaneous" in Petitioner's Exhibit 12 include the following items as they appear in Income Tax Returns for the years 1926-1939:

	Items shown in Income Tax Returns	Items shown in Exhibit 12
1926 Taxes collected	\$ 1,657.69	
Miscellaneous items	1,332.14	\$ 2,989.83
1927 Taxes	2,714.45	
Miscellaneous Income	240.07	2,954.52
1928 Insurance	271.24	
Miscellaneous	1,724.89	1,996.13
1929 Taxes	2,047.49	
Miscellaneous Income	842.35	2,889.84
1930 Taxes	1,703.54	
Miscellaneous Income	1,935.54	3,638.62
1931 Miscellaneous Income	421.24	
Taxes	923.26	1,344.50
1932 Taxes	11.05	
Insurance	244.80	
Miscellaneous Income	695.72	951.57

	Items shown in Income Tax Returns	Items as shown in Exhibit 12
1933 · Miscellaneous		\$ 158.31
1934 Miscellaneous	397.27	
Insurance	305.52	
Taxes	56.96	
Recording fees	253.20	1,012.95
<hr/>		
1935 Miscellaneous Income		480.45
1936 Miscellaneous Income		420.14
1937 Miscellaneous Income		327.63
1938 Refunds		88.55
1939 Refunds		280.93
<hr/>		
Total		\$19,533.97

In The Tax Court of the United States

Docket No. 5007

BLOOMFIELD RANCH, et al.,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STIPULATION OF FACTS

It is stipulated that:

Miller & Lux, Incorporated, a corporation (hereinafter sometimes called Miller), owned 21 separate parcels of land, substantially all ranches or ranch lands in the Counties of Santa Clara, San Benito, and Santa Cruz, California. The tracts were widely scattered, the distance between the most northerly

tract and the most southerly tract is about 14 miles, and the distance between the most westerly tract and the most easterly tract is about 13 miles. The 21 ranches contained about 27,500 acres, consisting of lands suitable for various purposes about as follows (though they had not all been used for those purposes): hay lands, about 1,500 acres; grain lands, about 3,000 acres; vegetable lands, about 2,500 acres; orchards, about 200 acres; orchard land, about 700 acres; vineyard land, about 200 acres; flat pasture, about 300 acres; hill pasture, about 14,000 acres; forest lands, about 3,100 acres; river bottoms, about 400 acres; swamp and overflowed lands, about 1,400 acres; industrial lands, about 30 acres; land in the City [235] of Gilroy, about 42 acres; and land in roads, about 60 acres. These properties were sometimes known and referred to as the Bloomfield Ranch. Miller operated the properties as one going concern, on which it handled thousands of cattle and produced much of the feed consumed by the cattle, maintained substantial feed yards upon the properties and fattened cattle there, and frequently employed as many as 200 men to attend to the cattle, farming operations and other work upon or connected with the various properties.

It became known at about the beginning of the year 1926 that these properties were for sale as a whole.

James A. Clayton & Co. (hereinafter sometimes called Clayton) is a corporation, organized under the laws of the State of California, in the year 1903, and having its principal place of business in San

Jose, Santa Clara County, in said state. It is engaged in and doing business as real estate agent and broker. The business was founded by James A. Clayton in 1867. About 1880 a partnership was organized, consisting of James A. Clayton and his two sons. Thereafter, the company was known as James A. Clayton & Co. and did business in San Jose as real estate agent and broker until the organization in 1903 of said corporation, which ever since then has been and is now carrying on the same business.

Clayton found the original investors in the Miller properties, each of whom, together with Clayton, contributed \$50,000 for that purpose. They were:

Florence G. Baldwin,

John R. Chace, also known as J. R. Chace,

Willis S. Clayton, also known as Willis Sherman Clayton, and as W. S. Clayton, [236]

James A. Clayton & Co.,

Arthur D. Curtner, also known as A. D. Curtner,

John P. Dorrance, also known as J. P. Dorrance,

Hugh S. Hersman, also known as H. S. Hersman,

George H. Osen, also known as Geo. H. Osen,

Alfred L. Parkinson, also known as A. Leroy Parkinson, and as A. L. Parkinson,

Andrew R. Patrick, also known as A. R. Patrick,

Warren L. Holmes, also known as W. L. Holmes,

Thomas Scoble, also known as Thos. Scoble,
Elias Shillingsburg, also known as E. Shillingsburg, and

Samuel Weinstein.

The following changes in the investors' interests, and no other, have been made since the original agreements were issued:

(a) John R. Chace died on September 2, 1931. His interest was distributed to his son John Derrol Chace, who is also known as J. D. Chace.

(b) Willis S. Clayton died on August 23, 1940. His interest was distributed one-half to his son Willis Sherman Clayton, Jr., and one-half to his son James Bradley Clayton, who transferred his interest to another of the investors. Florence G. Baldwin, his cousin, who transferred it to James A. Clayton & Co., another of the investors.

(c) John P. Dorrance died on March 9, 1928. His interest was distributed to Edith Kirk Dorrance, his widow, who thereafter died and her interest was distributed to John Kirk Dorrance, their son. [237]

(d) George H. Osen, on February 17, 1941, transferred his interest to himself and George A. Osen, his son, as joint tenants. George A. Osen thereafter died, and George H. Osen, by right of survivorship, now owns the entire original interest.

(e) Andrew R. Patrick died on May 20, 1935. His estate is still in probate in Monterey County, California. S. C. Cornett, who is also known as Sigurd C. P. Cornett, is the duly appointed, qualified and acting executor of his will.

(f) Warren L. Holmes, on August 10, 1928, transferred his interest to San Jose Hardware Company, a corporation, which was owned by him and his father.

(g) Thomas Scoble, on December 13, 1927, transferred to another of the investors, Arthur D. Curtner, a one-half of his one-fourteenth interest, and to A. Leroy Parkinson, another of the investors, a one-fourth of said interest, and to Harry H. Fitch, who was a partner, in the automobile business, of Investors George H. Osen and Arthur D. Curtner, a one-fourth of his interest. Thereafter, said Harry H. Fitch died, and his one-fourth of said one-fourteenth interest was distributed to Rose L. Fitch, his widow, and Margaret F. Coykendall, their daughter, share and share alike.

(h) E. Shillingsburg transferred on May 26, 1926, to A. A. Hapgood, also known as Alfred A. Hapgood, with whom he had been long associated in business investments, an undivided one-fifth of his undivided one-fourteenth interest. E. Shillingsburg died on January 18, 1932, and one-half of the remaining four-fifths of his one-fourteenth interest was distributed to his widow, Nellie Shillingsburg. The other one-half of said remaining four-fifths of said one-fourteenth interest was distributed to said Nellie Shillingsburg for and during her natural life, to use the rents, issues and profits thereof, and at her death to go to her daughters Anne Thompson, Margaret Leaman and Sarah Shillingsburg (who is now Sarah Shillingsburg Barry), share and share alike.

(i) Samuel Weinstein died on September 26, 1938. His estate is still in probate in the City and County of San Francisco, California. Ellen Weinstein is the duly appointed, qualified and acting executrix of his will.

The investors and their respective interests in the investment now are:

James A. Clayton & Co., $1/14$ plus $1/2$ of $1/14$;

Florence G. Baldwin $1/14$;

John Derrol Chace $1/14$;

Willis Sherman Clayton, Jr., $1/2$ of $1/14$;

Arthur D. Curtner $1/14$ plus $1/2$ of $1/14$;

John Kirk Dorrance $1/14$;

Rose L. Fitch $1/8$ of $1/14$;

Margaret F. Coykendall $1/8$ of $1/14$;

Hugh S. Hersman $1/14$;

Alfred A. Hapgood $1/5$ of $1/14$;

George H. Osen $1/14$;

Alfred L. Parkinson $1/14$ plus $1/4$ of $1/14$;

Estate of Andrew R. Patrick, deceased, $1/14$;

San Jose Hardware Co., $1/14$;

Nellie Shillingsburg $1/2$ of $4/5$ of $1/14$; [239]

Anne Thompson, Sarah Shillingsburg Barry and Margaret Leaman, $1/2$ of $4/5$ or $1/14$ subject to life estate of Nellie Shillingsburg, their mother;

Estate of Samuel Weinstein, deceased, $1/14$.

Clayton, with the sum of \$700,000 contributed by the investors as aforesaid, together with \$350,000 borrowed from the Bank of Italy (now Bank of America N. T. & S. A.), and \$235,000 borrowed

from Miller & Lux, Incorporated, bought the Bloomfield Ranch properties, taking title thereto by three deeds from Miller & Lux, Incorporated, to M. E. Thomas, each dated March 3, 1926, each conveying the land in only one, and a different one, of said three respective counties. The moneys were so borrowed as above mentioned upon notes signed by M. E. Thomas, secured by appropriate deeds of trust of Bloomfield Ranch lands, one to the Bank of Italy on a portion of the lands, and the other to Miller & Lux, Incorporated, on a different portion of the lands, and the three deeds and two deeds of trust were recorded in the respective counties, in which the lands affected by them are situated, on March 10, 1926. M. E. Thomas, in whose name the title was taken, is a single woman who was then and ever since has been and now is employed by Clayton. Title was so taken in her name as a convenience. She has no actual interest in the property.

Clayton began selling the lands as soon as they were purchased. Sales were made from 1926 to 1940, inclusive, as follows: [240]

Year	Sales	Acres	Received
1926	44	11,489.700	\$ 635,920.90
1927	33	6,757.437	344,568.96
1928	21	4,430.870	149,822.00
1929	22	447.969	180,308.70
1930	15	1,702.714	141,705.50
	<hr/>	<hr/>	<hr/>
	135	24,828.690	\$1,452,326.06

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

Stipulated that the items shown upon Exhibit “E” may be summarized as follows:

1. The following items are values set up for depreciation purposes only and are not expenditures.			
Frame warehouse	\$10,000.00		
Frame buildings	20,000.00		
Wells	5,333.25	\$35,333.25	
2. Expenditures: On pumping plants (including wells, motors and power lines)			
		\$37,903.55	
Repairing and rebuilding tank frames and tanks.....	602.44		
Houses, roofs and repairs.....	2,420.00		
Sheds	981.70		
Ditches	1,031.38	5,035.52	
Fences		\$ 1,392.29	
Concrete pine line.....	981.04		
Surface pipe	1,646.84	2,627.88	
Horses		400.00	
Miscellaneous		653.32	
			\$48,012.56

Of the sum of \$37,903.55, \$8,267.63 represents expenditures on pumping plants, including wells, that were on the premises when purchased from Miller & Lux, Incorporated.

Wells were acquired and disposed of as follows:

Item	Number	Sold	Oper- ating Dry Hole	Worth- less
On land when purchased.....	9	8	1
Drilled after purchase.....	20	5	12	3
Drilled by purchasers and ac- quired by foreclosure.....	3	2
Drilled by tenant.....	1	1
	—	—	—	—
	33	16	13	3
				1

Copies of the account in the form shown by Exhibit 11 were distributed to the investors from time to time generally but not always bimonthly.

/s/ O. K. CUSHING,

/s/ EUSTACE CULLINAN,

/s/ DELGER TROWBRIDGE.

Counsel for Petitioners.

/s/ J. P. WENCHEL,

TMM

Chief Counsel, Bureau of

Internal Revenue,

Counsel for Respondent.

[Endorsed]: Filed July 20, 1945. [243]

[Title of Tax Court and Cause.]

MEMORANDUM FINDINGS OF FACT AND OPINION

Harron, Judge:

A partnership income tax return was filed for Bloomfield Ranch for the year 1940. The respondent has held that Bloomfield Ranch is an association as defined in section 3797(a)(3) of the Code, and that it is therefore taxable as a corporation. That determination has resulted in a deficiency in income tax and declared value excess profits tax for the year 1940 in the respective amounts of \$6,646.60 and \$4,159.58. The general question is whether Bloomfield Ranch is an association taxable as a corporation.

The partnership return was filed with the collector for the first district of California. [244]

The record consists of stipulations of fact, testimony and exhibits.

Findings of Fact

The stipulations of fact are adopted as part of the findings of fact, and are incorporated herein by reference.

The petition in this proceeding is filed under the name of Bloomfield Ranch by James A. Clayton & Co., and others, who describe themselves as partners and co-owners of "Bloomfield Ranch."

The issue relates to real estate, later referred to as Bloomfield, located in California, in the counties of Santa Clara, San Benito, and Santa Cruz, com-

prising 21 separate parcels of land, which were owned, originally, by a corporation named Miller & Lux, Inc. The 21 parcels of land contained about 27,500 acres, which were suitable for various agricultural purposes, of which some parts were river bottoms, forest lands, swamp and overflowed lands, land in roads; and 42 acres were located in the city of Gilroy. The tracts were widely scattered; and the distance from north to south was about 14 miles; and, from east to west, about 13 miles. Miller & Lux had operated the properties as one going concern for raising cattle and feed, and for conducting some farming operations. Thousands of heads of cattle were handled, and as many as 200 men were employed, at times, to attend to the cattle.

The properties above described were sold on March 10, 1926, under the following arrangements:

The president of James A. Clayton & Co., hereinafter called Clayton Company, induced thirteen customers of the company to join with the company in the purchase of the above described properties. Clayton Company, a California corporation, has been engaged in the business of real estate [245] agent and broker since 1903. Clayton Company and thirteen individuals advanced \$50,000, each, or a total of \$700,000 cash. They formed what they called a "syndicate." The only "agreement" of the parties was represented by fourteen separate written instruments, identical in terms, which were signed by Clayton Company, designated as "Operator"; and each person who contributed to the fund of \$700,000,

designated as "Investor." The agreement, comprised of the fourteen separate instruments, acknowledged receipt of \$50,000 by the Operator for the purposes and upon the terms stated.

The purposes and terms set forth in the instruments of agreement, which are incorporated herein by reference, are briefly as follows:

1. The Operator, Clayton Company, was to use the entire fund contributed by the Investors, and other funds borrowed by the Operator, to purchase the several tracts of land, comprising about 27,000 acres, from Miller & Lux. Titles were to be held in the name of an employee of Clayton Company, M. E. Thomas. However, it was provided that titles could be held in the name of Clayton Company, or of any person, corporation, or concern, and that the Operator could have titles conveyed to other persons, corporations, or concerns in trust for the fourteen Investors. The purpose was for "the profitable resale" of the lands.

2. The Operator was empowered to "sell, convey, hold, lease for one season only, or in any otherwise deal with and treat said properties as the sole and absolute owner thereof in fee simple, and without let or hindrance from the Investor, or any of the Investors, less than the full number thereof," but it could not "exchange, encumber, nor lease except as above specified, nor sell the tres. wood or improve-

ments off from said property without the consent of the Investors." The Operator could incur costs and expenses in connection with "acquiring, holding, renting, selling, or protecting of said properties" as it should deem proper.

3. The Operator was authorized to use the moneys received from "sales or renting or other sources of said properties," for the payment, first, of a commission of 5 per cent to itself on the gross selling prices of each parcel sold; and for the payment of all costs, expenses, and charges paid or incurred by the Operator in the premises; and for the repayment of all moneys borrowed, together with interest.

4. Each Investor was entitled to have returned to him the \$50,000 which he advanced, in whole or in part, in the Operator's judgment, but no Investor was entitled to receive repayment of his contribution before the properties had been converted into cash and all charges and expenses had been fully paid. When all the properties are sold and all debts paid, the Operator shall pay the net proceeds to the Investors, in equal shares to each of them, their heirs and assigns. It was provided that distributions could be made in equal amounts to each Investor whenever the Operator had a net amount, after payment of charges, of \$7,000 or more on hand.

5. It was agreed that the Operator should receive a commission of \$50,000 for negotiating and consummating the purchase of the properties from Miller & Lux, in addition to the 5 per cent commissions on resales.

6. Each Investor is entitled to have an accounting rendered to him, but not oftener than once each 60 days.

7. The agreement of each Investor is binding upon his successors, heirs, representatives, and assigns.

On March 10, 1926, Clayton Company paid Miller & Lux \$1,235,000 for the several parcels of land, which were known as "Bloomfield," and which are referred to hereinafter as Bloomfield, for convenience. Clayton Company borrowed \$585,000, which with the \$700,000 of the Investors made up \$1,285,000, the purchase price plus the Operator's \$50,000 commission. Titles were taken in the name of M. E. Thomas, an employee of Clayton Company; notes were signed by her; and deeds of trust were given to two concerns which loaned the borrowed money.

When the lands were acquired from Miller & Lux, there were leases existing which had been made by Miller & Lux, and the land was taken over subject to the leases. They yielded rents of \$34,041 in 1926. [247]

During a five year period, 1926 to 1930, inclusive, 90 per cent of the property, about 24,828 acres, were sold for the total sum of \$1,452,326. The loans from

Miller & Lux and the Bank were paid by the end of 1927. At the end of 1930, there remained 2,672 acres, unsold.

The depression following the "crash" of October, 1929, depressed the real estate market, generally, and the sales of the property in question fell off after 1930. During ten years, from 1930 to 1940, inclusive, the only sales were sales of 60 acres for rights of way for public services, and but for such sales, no sales would have been made in 1935, 1938, 1939, 1940, and 1942. From 1941 to 1944, 1,112 acres were sold for \$541,843, most of the sales being made in 1944. At the end of 1944, 1,500 acres remained unsold.

The 42 acres in the town of Gilroy were sold in parcels making up a city block. There was never any intention of subdividing this acreage into lots, and the Operator refused to sell land in units of less than one block.

From the beginning, in 1926, Clayton Company adopted a policy of renting parcels of the acreage under leases to run for one year, subject to renewal for another year; and of keeping some of the acreage under cultivation in wheat or barley, until parcels were sold. When lands were sold, tenants were moved to other locations. The reasons for renting and cultivating the acreage, pending sales, were two-fold: To carry the taxes on the property and to keep the property from going "native," i.e., becoming over-grown with weeds and brush. The Operator paid himself a commission for renting lands. Income from farming and renting was [248]

accounted for separately on tax returns. Farming operations were carried on at a loss except in 1930, 1931, and 1934.

From 1926 through 1940, the operations of Clayton Company consisted of farming, renting, and selling property; collecting rents and payments of principal and interest on installment sales; paying taxes; disposing of produce raised on farms; and, in general, taking care of the financial and accounting aspects of the venture.

During the 15-year period, 1926 through 1940, receipts of interest totalled \$156,402.85; profits from sales totalled \$311,766.93; gross receipts from rents totalled \$456,062.91; and miscellaneous receipts totalled \$19,533.97. The total of taxes for the same period was \$224,722.76.

Sales to and including 1940 totalled \$1,474,243.06. Sales during 1941 to 1944, inclusive, totalled \$352,600. The total gain over the cost of the properties, \$1,285,000, aggregates \$541,843.06.

Distributions totalling \$98,250 have been made to each holder of the fourteen units, totalling \$1,375,500, which represents return of the original \$700,000 capital plus profits from all operations.

When all the acreage was purchased in 1926, Miller & Lux had put in nine wells and nine pumping units for pumping water. After 1931, when Clayton & Co., and some tenants, turned to truck farming, wet farming; and when dry years reduced the level of water in the ground, Clayton & Co. put in some wells and pumps, and made some repairs to existing wells and pumps, at a total cost of

\$37,903, of which sum \$8,267 was spent on the Miller & Lux wells and pumps. [249]

There have not been any exchanges of the Bloomfield property, nor reinvestments in other property.

Frazier O. Reed, president of Clayton Company, managed the operations. He discussed progress with the Investors when he saw them, individually. He called them all together to meet on three occasions to discuss income tax problems.

There were originally fourteen Investors and each had a one-fourteenth interest in the venture. Since 1926, changes have occurred in the Investors' interests due to deaths, transfers, and sales of all or part of a one-fourteenth interest, so that there are now nineteen Investors holding the original fourteen interests, some holding less than a one-fourteenth's interest, and some holding a complete one-fourteenth interest plus part of another one-fourteenth interest.

Whenever any changes in interest were made, Clayton Company was notified and made formal acknowledgment and record of the change in interests. The original agreement of each Investor had attached to it endorsement of any assignment or transfer of all or part of a one-fourteenth interest which showed how the transfer of interest came about or was made.

The Bloomfield Ranch Syndicate is an association taxable as a corporation. [250]

Opinion

The only question is whether Clayton Company and certain individuals constitute an association within the definition contained in section 3797(a) of the Internal Revenue Code, so as to constitute a taxable entity, taxable as a corporation as respondent has determined. The taxable year is 1940. There are nineteen petitioners in this proceeding.

Petitioner relies chiefly upon *Commissioner v. Gerstle*, 95 Fed. (2d) 587.

The question must be decided upon the particular facts of this case.

Upon careful examination of the evidence, it is concluded that those who made up a fund of \$700,000 for the purchase of the Miller & Lux property constituted an association, and that respondent has correctly determined that there was an association taxable as a corporation. The question is controlled by *Morrissey v. Commissioner*, 296 U. S. 344; *Helvering v. Combs*, 296 U. S. 365; *Huron River Syndicate*, 44 B.T.A. 859; *Helm & Smith Syndicate v. Commissioner*, 136 Fed. (2d) 440; *Bing & Bing, Inc.*, 35 B.T.A. 1170; *Kilgallon v. Commissioner*, 96 Fed. (2d) 337; cert. denied 305 U. S. 622.

Petitioners contend that the Bloomfield venture was a liquidation operation. On this point, we are required by *Morrissey v. Commissioner*, *supra*, to look to the terms of the agreement of the parties and petitioners are not at liberty to say that they had a narrower or different purpose. *Title Insurance & Trust Company v. Commissioner*, 100 Fed.

(2d) 482, 485. All of the parties agreed that about 27,000 acres of land were to be acquired and held for resale. The parties pooled their funds for the purpose of acquiring the property and reselling it at a profit. The purpose was stated to be "profitable resale." One member of the group was made the "Operator," or manager. It was given power to sell, convey, hold, and lease for one season, the properties, and to deal with the properties as though it was the sole owner; and to incur expenses in connection with the acquiring, holding, renting, selling, or protecting the properties as it should deem proper.

The acquisition of property for the express purpose of resale at a profit is a business undertaking. *G. F. Sloan, et al.*, 24 B.T.A. 61; *aff'd.*, 63 Fed. (2d) 666; *Adelaide Park Land*, 25 B.T.A. 211; *Bing & Bing, Inc.*, *supra*. The acreage acquired was large and of varied character, most of it being raw country land suitable for ranching and farming, and 42 acres being city property. In good times, comparatively speaking, as the record shows, an operation of reselling such extensive holdings could not be carried out quickly, but would require several years. The record shows that it required five years to sell the major part of the property when the real estate market was good. While the petitioners contend that the original purpose was the immediate resale of the property, thus seeking to bring the question at issue, within the holding of the *Gerstle* case, the contention is not supported by the facts or the terms of the agreements. Such a large

undertaking is not to be compared to that which was involved in the Gerstle case. Furthermore, the purpose was stated in the agreements to be the “profitable resale” of the properties [emphasis supplied], and there was no provision made about any time within which such purpose was to be carried out. Also, the agreements contemplated that the Operator could hold the property and could rent it for one-year terms during periods of holding. All that it was necessary to do constituted the conduct of a business for profit. It was necessary to negotiate many leases to rent portions of the land during the periods of holding; it was necessary to negotiate many sales and make many conveyances to resell the entire acreage; it was necessary to collect payments of principal and interest on installment sales contracts over periods of years. Clearly, the purpose was to make profits by dealing in real estate. We so conclude from the evidence. Clearly, the venture was not a mere liquidating undertaking. See *Morrissey v. Commissioner*, *supra*. See *United States v. Rayburn, et al.*, 91 Fed. (2d) 162.

In *Morrissey v. Commissioner*, *supra*, the Supreme Court stated that the distinguishing characteristic of an “association” is that it is “created to enable the participants to carry on a business and divide gains which accrue from their common undertaking”; and that the term “association” implies associates entering into a joint enterprise for the transaction of business. We have here such association of persons for the transaction of business. Petitioners contend otherwise, arguing that

each Investor, separately, was a principal, and Clayton Company was his agent. But we regard the argument as unsound. Although there was no single agreement, in form, each instrument contained identical terms and referred to the "thirteen other persons," the "Investors" who contributed "other sums"; and each instrument provided that Clayton Company was to use all of the sums contributed by all the Investors to purchase lands from Miller & Lux. Also, no Investor was entitled as a matter of right to receive any return or repayment of his contribution until all the properties were sold and all the debts paid; and all Investors were to share equally in the distributions [253] whenever they were made. It must be concluded that the fourteen instruments constituted a single agreement.

The undertaking was large; it required \$700,000 cash; it involved the purchase and resale of unusually large acreage of land. The venture was one which required associates. It was one, for example, that Clayton Company did not care to undertake alone. Under the name of "syndicate" Clayton Company, itself a member, brought into association thirteen others to enable all of the participants to carry on a venture of dealing in real estate and sharing the net profits accruing from the acquiring, holding, renting, and selling of the property. It is concluded that petitioners constituted an association. *Morrissey v. Commissioner*, *supra*. The facts show that the Bloomfield or Miller & Lux syndicate was substantially the same as the Car barn Syndicate in *Bing & Bing, Inc.*, *supra*.

Petitioners contend that they were owners of undivided equitable interests in real property, who had appointed an agent to sell the property, and that while titles were taken in the name of M. E. Thomas, she was only a trustee of a resulting trust. Petitioners admit that there was no express trust. This argument is unsound and it is answered by the terms of the fourteen instruments constituting the agreement of the parties. The instruments provided that titles to property were to be taken and held by the Operator in the name of M. E. Thomas, but that the Operator could have the titles conveyed to other persons, corporations or concerns, "or otherwise conveyed or held, as the Operator may desire, in trust for the said fourteen Investors." Titles were originally taken and held by the Operator in the name of M. E. Thomas, and no change was ever [254] made. The titles were not held by M. E. Thomas in trust. Furthermore, the fourteen Investors were not given any undivided interests in the realty which was purchased. They were given only the right to receive "moneys remaining in the Operator's hands" after paying all costs, obligations, and expenses; they were given the right only to have returned to them, at the same time, in equal amounts, the whole or part of the sum receipted for in each instrument; and no Investor was entitled, "as of right," to any payment or return "before said properties and the proceeds thereof have been converted into cash," and all expenses, debts, charges, and commissions had been fully paid. From the terms of the instruments it must

be concluded that the interests of the Investors were limited to rights to receive distribution of the net profits to be derived from the operation and sales of the land; and that their beneficial interests were only personal claims against the Operator; and that the Investors did not have interests in the land itself. See *Huron River Syndicate*, *supra*. The nature of interests of the Investors serves to distinguish this case from the *Gerstle* case where it was held that individuals were joint ventures, and the Circuit Court concluded that they were "equitable owners of the property acquired, and that their beneficial interests were not merely personal claims against the syndicate managers." See *Kilgallon v. Commissioner*, *supra*. It appears that petitioners advance the argument here that Clayton Company was a trustee-manager for each Investor. If they do, we must hold in this case, as was held in the *Kilgallon* case, that "the trustee-manager devise by the persons who were financially interested in the venture, constituted an 'association' which was taxable as a corporation * * *." [255]

There remains for consideration the point of the resemblance of the syndicate in question to the corporate form. Of the five salient characteristics of an association taxable as a corporation which are set forth in *Morrissey v. Commissioner*, *supra*, the following are found present here: Title to the properties was taken by the Operator, Clayton Company, for the benefit of the enterprise. The Operator was a corporation, and hence, its life was continuous. It took title to the properties in the name of one

of its employees; it had the power to have the title conveyed to any other person, corporation, or concern. Thus there was provision for a successor for the purpose of holding the titles. Management and control were centralized in Clayton Company. The death of the individual participants would not and did not cause any change in the constitution of the venture. Accordingly, the analogy to a corporate form of organization is found here in the terms of the agreements which provide for centralized management and the continuity in existence of the venture "secure from termination or interruption by death of owners of beneficial interests." The ownership of the beneficial interests was evidenced by the fourteen instruments and each instrument was binding on successors, heirs, representatives, and assigns. Transfers of entire interests and parts of interests were actually made by sales and assignments; and upon the deaths of some of the original Investors, their interests passed to their heirs, some of whom are petitioners in this proceeding. These transfers and deaths did not affect the continuity of the enterprise. Respondent contends that although limited liability was not expressly provided for in the agreements, liability was in fact limited to the \$50,000 investment which each Investor originally made in the enterprise. [256] Respondent's argument has much merit, and the provisions of the instruments are such that it is difficult to understand how the Investors could incur any liability to third parties dealing with the Operator, Clayton Company. However, absence of this single feature

is "insufficient to remove the taxpayer from the corporate class." *Jordan Creek Placers*, 43 B.T.A. 131, 135; *Huron River Syndicate*, *supra*; *Del Mar Addition*, 40 B.T.A. 833; *Bert v. Helvering*, 92 Fed. (2) 491.

We find that the major and important features set out in *Morrissey v. Commissioner*, *supra*, are present here, and conclude that the resemblance of the syndicate to the corporate form is sufficiently substantial to warrant its taxation as a corporation.

It is held that the petitioners representing Bloomfield Syndicate are an association taxable as a corporation. Respondent's determination is sustained.

Decision will be entered for the respondent.

Entered Jan. 31, 1947.

[Seal] [257]

The Tax Court of the United States

Washington

Docket No. 5007

BLOOMFIELD RANCH, et al.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered January 31, 1947, it is

Ordered and Decided: That there are deficiencies

in income tax and declared value excess profits tax for the year 1940 in the respective amounts of \$6,646.60 and \$4,159.58.

Entered Jan. 31, 1947.

[Seal] /s/ MARION J. HARRON,
Judge. [258]

[Title of Tax Court and Cause.]

STIPULATION

Whereas, Estate of Samuel Weinstein, deceased, by Ellen Weinstein, as Executrix of the will of Samuel Weinstein, deceased, was one of the petitioners in the above-entitled cause, and said Ellen Weinstein died on August 15, 1946, while said cause was under submission before the Tax Court, and Ellen Weinstein succeeded to the interest of Samuel Weinstein in the matter involved [259] in the above-entitled cause, as appears by the decree of distribution in the Matter of the Estate of Samuel Weinstein, deceased, a certified copy whereof is hereunto annexed; and Wells Fargo Bank & Union Trust Co. has been appointed Executor of the Will of Ellen Weinstein, deceased, as appears by the Letters Testamentary in the Matter of the Estate of Ellen Weinstein, deceased, a certified copy whereof is hereunto annexed;

It Is Stipulated that Wells Fargo Bank & Union Trust Co., as Executor of the will of Ellen Wein-

stein, deceased, may be substituted in the above-entitled cause as a petitioner, in the place of Estate of Samuel Weinstein, deceased, by Ellen Weinstein, as Executrix of the will of Samuel Weinstein, deceased.

/s/ O. K. CUSHING,

/s/ EUSTACE CULLINAN,

/s/ DELGER TROWBRIDGE,

Counsel for Petitioners.

J. P. WENCHEL, LAM

Counsel for Commissioner.

So ordered:

Judge.

Dated: [260]

The annexed instrument is a correct copy of the original on file in my office.

Attest:

Certified Mar. 28, 1947.

[Seal] ROBERT MUNSON,

County Clerk of San Francisco, and Ex-officio Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco.

By J. V. FARLEY,
Deputy.

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 79877

Dept. 9

In the Matter of the Estate of
SAMUEL WEINSTEIN,
Deceased.

H. W. Steinegger, 275 Bush Street, San
Francisco, SUTTER 3500, Attorney for Execu-
trix.

DECREE OF FINAL DISTRIBUTION

The petition of Ellen Weinstein, as Executrix of the Last Will and Testament of Samuel Weinstein, deceased, for final distribution, coming on regularly this day to be heard, and said Executrix being represented in court by her attorney, oral and documentary evidence having been introduced, and it appearing therefrom:

That notice as required by law has been duly and regularly given of the hearing of said petition; and

That Samuel Weinstein died testate in the City and County of San Francisco, on the 26th day of September, 1938, and was at the time of his death a resident of said City, [261] County and State and left therein an estate consisting of personal property; and

That Ellen Weinstein was named in the Last Will and Testament of said decedent to serve as Executrix thereof without bond and was after pro-

ceedings duly had for that purpose on the 30th day of November, 1938, appointed Executrix of the Last Will and Testament of said decedent, and forthwith qualified as such, and ever since has been and now is the duly appointed, qualified and acting Executrix of the Last Will and Testament of said decedent; and

That thereafter and at the time required by law, notice was given to the creditors of said decedent and of said estate and an affidavit showing due publication of said notice in "The Recorder," which said affidavit contains a copy of the notice and states the date of its first publication, has heretofore been filed with the Clerk of the Court within thirty days after the completion of the publication, to wit: on December 30, 1938, and said notice has been duly and regularly given; and

That thereafter the property of said decedent was appraised as required by law and an inventory and appraisal thereof filed by said Executrix showing the value of the property on September 26, 1938, to be the sum of \$43,500.00; and

That more than six months have elapsed since the first publication of notice to creditors of said decedent and of said estate and that all claims which have been presented against [262] said estate, and all debts of said estate, including United States, State, City, County and other taxes payable by said estate and said Executrix, including attorney fees to Stern & Grupp have been paid; that there is no collateral inheritance tax due the State of California herein, and that said estate is in a condition for final distribution; and

That by the terms of the Last Will and Testament of said decedent, any and all property of which decedent died seized or possessed is to be distributed to Ellen Weinstein, the widow of said decedent; and

That Ellen Weinstein, as the sole legatee under the Will of said decedent, has waived the rendering of any and all accounts whatsoever, and has waived all claims to commissions as Executrix herein, and that Ellen Weinstein, as such Executrix, has agreed to pay to H. W. Steinegger, the present attorney for said Executrix and Estate, the sum of Five Hundred Dollars (\$500.00) for services rendered to said Executrix and to said Estate; and

The matter having been submitted to the Court and the Court being fully advised in the premises;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

(1) That notice as required by law has been given of the hearing of the petition for final distribution herein; [262]

(2) That notice as required by law has been given to the creditors of said decedent and of said estate;

(3) That all claims which have been presented against said estate, and all debts of said estate and all taxes and other payments required to be made by said decedent or said estate to the United States, State of California, City and County of San Francisco, or to any other governmental or political subdivision, including attorney fees to Stern & Grupp,

the former attorneys for said Executrix of said estate, have been paid; that there is no collateral inheritance tax due the State of California herein;

(4) That Ellen Weinstein, as the sole legatee under the Will of said decedent, has waived the rendering of any and all accounts whatsoever;

(5) That Ellen Weinstein, as Executrix of the Last Will and Testament of said decedent, has waived all claims to commissions as Executrix herein;

(6) That H. W. Steinegger is entitled to a fee of Five Hundred Dollars (\$500.00) for services rendered as attorney for said Executrix and said Estate, and that said fee is hereby allowed to said attorney, and said Executrix is hereby authorized and directed to pay to said H. W. Steinegger the sum of Five Hundred Dollars (\$500.00) as attorney's fees herein;

(7) That the property of said estate is hereby distributed [264] as follows:

To Ellen Weinstein:

All cash on hand;

A one-fourteenth ($1/14$) interest in the Bloomfield Ranch Syndicate, the legal title of the properties of which stands in the name of M. E. Thomas;

All other property of every kind and nature and wheresoever situate belonging to said decedent or said estate or of which said decedent died seized, which is not herein specifically described, whether or not now known or discovered.

It Is Further Ordered, Adjudged and Decreed that said Executrix, Ellen Weinstein, shall upon the filing of a receipt herein executed by the legatee and distributee hereunder be discharged from all further duty, obligation or liability as Executrix of the Last Will and Testament of said decedent.

Done in open court this 19th day of November, 1945.

/s/ T. I. FITZPATRICK,

Judge of the Superior Court.

Filed Nov. 18, 1945. H. A. van der Zee, Clerk;
by (signed) J. V. Farley.

Recorded: Vol. 1139, Page 393. April 20, 1946.
H. A. van der Zee, Clerk; by C. D. Carroll, Deputy
Clerk. [265]

The annexed instrument is a correct copy of the original on file in my office.

Attest:

Certified March 28, 1947.

[Seal]

ROBERT MUNSON,

County Clerk of San Francisco and ex-officio Clerk
of the Superior Court of the State of California,
in and for the City and County of San
Francisco.

By J. V. FARLEY,
Deputy.

In the Superior Court of the City and County of
San Francisco, State of California, Probate

Dept. No. 9

Probate No. 104330

In the Matter of the Estate

of

ELLEN WEINSTEIN,

Deceased.

LETTERS TESTAMENTARY—DUPLICATE

State of California,

City and County of San Francisco—ss.

The Last Will of Ellen Weinstein, Deceased, having been proved in the Superior Court of the City and County of San Francisco, State of California, Wells Fargo Bank & Union Trust Co., (a corporation), successor to Union Trust Company of San Francisco, which is named therein as such is hereby appointed [266] Executor.

Witness H. A. van der Zee, Clerk of the Superior Court of the City and County of San Francisco, State of California, with the Seal of said Court affixed, this 13th day of September, 1946. By Order of the Court.

[Seal]

H. A. VAN DER ZEE.

Clerk.

By J. V. FARLEY,

Deputy Clerk.

State of California,
City and County of San Francisco—ss.

Brian E. Gagan being duly sworn deposes and says, I am an officer, to-wit, the Trust Officer of Wells Fargo Bank & Union Trust Co., the corporation above-named, and am authorized to make and subscribe oaths on its behalf.

I do solemnly swear that said Wells Fargo Bank & Union Trust Co. will support the Constitution of the United States, and the Constitution of the State of California, and that it will faithfully perform the duties of Executor of the Last Will and Testament of Ellen Weinstein, Deceased, according to law.

BRIAN E. GAGAN.

Subscribed and sworn to before me this 13th day of September 13, 1946.

[Seal]

AGNES M. COLE,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires August 27, 1947.

Filed: Sept. 13, 1946. H. A. van der Zee, Clerk,
J. V. Farley.

[Endorsed]: Received and filed March 31, 1947.

[Title of Tax Court and Cause.]

APPEARANCE

Ellen Weinstein, who, as Executrix of the Will of Samuel Weinstein, deceased, was a petitioner in the above-entitled cause, having died on August 15, 1946, and Wells Fargo Bank & Union Trust Co., having been duly appointed Executor of the Will of Ellen Weinstein, deceased, by the Superior Court of the State of California, in and for the City and County of San Francisco, and having been substituted in the above-entitled cause as a petitioner in the place of Estate of Samuel Weinstein, deceased, by Ellen Weinstein, as Executrix of the Will of Samuel Weinstein, deceased, Wells Fargo Bank & Union Trust Co., as Executor of the Will of Ellen Weinstein, deceased, hereby appears in the above-entitled cause as a petitioner pursuant to the said substitution.

/s/ O. K. CUSHING,

/s/ EUSTACE CULLINAN,

/s/ DELGER TROWBRIDGE,

Counsel for Petitioners on
Review.

[Endorsed]: Received and filed March 31, 1947.

[Title of Tax Court and Cause.]

ORDER

Upon consideration of the stipulation filed in the above-entitled proceeding March 31, 1947, and it appearing therefrom that Ellen Weinstein is deceased and that in the Estate of Samuel Weinstein, an order of distribution was entered November 19, 1945, whereby Ellen Weinstein became entitled to any interest held by the Estate of Samuel Weinstein, deceased in the Bloomfield Ranch, it is

Ordered that the Estate of Ellen Weinstein, deceased, Wells Fargo Bank & Union Trust Co., Executor, be and it is hereby substituted as the party petitioner in the above-entitled proceeding in the place and stead of the Estate of Samuel Weinstein, deceased, by Ellen Weinstein, Executrix.

[Seal] /s/ MARION J. HARRON,
Judge.

Dated: Washington, D. C., March 31, 1947.
VSM/evd [269]

In the United States Circuit Court of Appeals
For the Ninth Circuit

Tax Court of the United States, Docket No. 5007

BLOOMFIELD RANCH, et al.,
Petitioners on Review,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

PETITION FOR REVIEW

The petitioners above-named, hereinafter referred to as "Petitioners," hereby petition the United States Circuit Court of Appeals for the Ninth Circuit to review the decision [270] entered by the Tax Court of the United States on January 31, 1947, ordering and deciding that there are deficiencies in income tax and declared value excess-profits tax for the year 1940 in the respective amounts of \$6,646.60 and \$4,159.58. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code. The individual petitioners are residents of the State of California and the corporation petitioners are corporations each organized and existing under and by virtue of the laws of the State of California and each having its principal place of business in said state. The tax return for the year 1940 which is involved herein was made to the Collector of Internal Revenue for the First Collection District of California. The First Collection District of Cali-

formia is within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit and this review is sought in said Court.

Nature of Controversy

Petitioner James A. Clayton & Co., hereinafter called "Clayton," is a corporation engaged in and doing business as a real estate agent and broker at San Jose, California. Early in 1926 it learned that Miller & Lux, Inc., was willing to sell lands which it owned aggregating about 27,500 acres. Clayton presented to a number of its customers, each of whom was willing to appoint Clayton as his agent on a commission basis, the opportunity to buy and then sell those lands at a profit. During January and February, 1926, Clayton and thirteen [271] of its customers each contributed \$50,000 to be used, with other money to be borrowed, in the purchase of said lands. Each investor upon payment received a document signed by Clayton and the investor, dated March 10, 1926, which documents were identical except for the names of the respective investors. A copy of that document is annexed to petitioners' petition to the Tax Court as Exhibit 1. The lands were bought and paid for, and over 90% of them were sold by the end of 1930 when the depression made itself felt. Thereafter the sales were almost nominal, less than 61 acres having been sold from 1931 to 1940 inclusive. It was necessary for Clayton to lease or farm the land in order to maintain it in a salable condition during the depression.

A partnership return of income for the calendar

year 1940 was made to the Collector of Internal Revenue for the First Collection District of California by the petitioners herein under the name Bloomfield Ranch showing income thereof and the respective shares of the petitioners therein, similar in form to returns that had been filed and accepted each year since 1926. Under date of February 28, 1944, the Commissioner issued a ninety-day notice addressed to Bloomfield Ranch, which stated "You filed a return on Form 1065 as a partnership. It is held that you are an association as defined in Section 3797 (a) (3) of the Internal Revenue Code, and are therefore subject to tax as a corporation," and the Commissioner assessed deficiencies for the year 1940 of \$6,646.50 in income tax liability, and of \$4,159.58 in declared value excess-profits tax liability. [272]

The Tax Court has sustained the Commissioner's determination.

Respectfully,

/s/ O. K. CUSHING,

/s/ EUSTACE CULLINAN,

/s/ DELGER TROWBRIDGE,

Counsel for Petitioners.

[Endorsed]: Received and filed T.C.U.S April 21, 1947. [273]

In The Tax Court of the United States

Docket No. 5007

BLOOMFIELD RANCH, et al.,

Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

To the Commissioner of Internal Revenue, and to
J. P. Wenchell, Esq., Chief Counsel, Bureau of
Internal Revenue:

You Are Hereby Notified that the Petitioners
above-named did, on the 21st day of April, 1947,
file with the Clerk of the Tax Court of the United
States, at Washington, [274] D. C., a petition for
review by the United States Circuit Court of Ap-
peals for the Ninth Circuit of the decision of the
Tax Court heretofore rendered in the above-entitled
cause. A copy of the Petition for Review as filed is
hereto attached and served on you.

Dated: This 21st day of April, 1947.

/s/ O. K. CUSHING,

/s/ EUSTACE CULLINAN,

/s/ DELGER TROWBRIDGE,

Counsel for Petitioners on
Review.

Personal service of the above and foregoing
notice, together with a copy of the Petition for
Review, is hereby acknowledge this 21st day of
April, 1947.

/s/ J. P. WENCHEL, C.A.R.,

Counsel of Respondent on
Review. [275]

In the United States Circuit Court of Appeals
For the Ninth Circuit

T. C. Docket No. 5007

BLOOMFIELD RANCH, et al.,
Petitioners on Review,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

MOTION FOR TRANSMISSION OF
ORIGINAL EXHIBITS

Come now the parties to the above-entitled proceeding by their counsel of record, and

Averring that Petitioners' Exhibits 11 and 14 and Respondent's Exhibit E which were received in evidence in the official proceeding before the Tax Court of the United States, are documents which would be costly or difficult to reproduce or print; it is moved: [276]

1. That the originals of said Petitioners' Exhibits 11 and 14 and Respondent's Exhibit E, instead of being fully set forth in the transcript to be certified by the Clerk of the Tax Court of the United States to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, may be transmitted by the Clerk of the Tax Court to the Clerk of this Court, said exhibits, however,

to remain in the custody of the Clerk of the Tax Court until fifteen days prior to the hearing before this Court and, upon direction and at the expense of counsel for petitioners, to be then transmitted by the Clerk of the Tax Court to the Clerk of this Court.

2. That said exhibits need not be printed in the record on review herein but may be referred to by counsel in their respective briefs and on oral argument, or reproduced, in whole or in part, in an appendix to their respective briefs, and considered by the Court with the same force and effect as if included in the printed record on review.

3. That the Clerk of this Court be instructed to transmit to the Clerk of the Tax Court of the United States, Washington 25, D. C., a certified copy of the order entered herein to be by him incorporated in the transcript of record filed in this Court. [277]

Wherefore, it is prayed that this motion be granted.

/s/ EUSTACE CULLINAN,

/s/ DELGER TROWBRIDGE,

/s/ O. K. CUSHING.

Attorneys for Petitioners.

/s/ J. P. WENCHEL, C.A.R.,

Chief Counsel, Bureau of Internal Revenue.

/s/ SEWALL KEY, C.A.R.,

Acting Assistant Attorney General,

Attorneys for Respondent.

So Ordered:

WILLIAM DENMAN,
Senior United States Circuit
Judge.

A True Copy:

Attest: May 2, 1947.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed T.C.U.S. May 7, 1947.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD, PROCEEDINGS
AND EVIDENCE TO BE CONTAINED IN
THE RECORD ON REVIEW

To the Clerk of the Tax Court of the United States:

You will please prepare, transmit and deliver the complete record and all the proceedings and evidence in the above-entitled cause to the [279] Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, viz., copies, and originals where noted, duly certified as correct, of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit heretofore filed by the Petitioners above-named:

(1) Docket entries of all proceedings before the Tax Court.

(2) Pleadings before the Tax Court.

(a) Petition with Exhibit A (notice and statement of deficiency) annexed thereto.

(b) Answer.

(3) Transcript of the proceeding before the Tax Court on June 10, 1945.

(4) The following exhibits introduced in evidence before the Tax Court:

Petitioners' (Taxpayer's) Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10;

Exhibit 11 (originals of eight photostat sheets, see Record, page 60);

Exhibits 12 and 13; and

Exhibit 14 (original map, see Record, page 84);

Respondent's Exhibits A, B, C, F and D;

Exhibit E (original copy of tabulation, see Record, page 111).

(5) Stipulation of the parties as to certain facts, received at the trial. (See Record, pages 22 and 23).

(6) Stipulation of facts regarding items shown upon [280] Exhibit E. (Filed with Court Room Clerk July 22, 1945).

(7) Memorandum Findings of Fact and Opinion of the Tax Court.

(8) Decision of the Tax Court.

(9) Stipulation for substitution of Wells Fargo Bank & Union Trust Co., as executor of the Will of Ellen Weinstein, deceased, as petitioner in place of Estate of Samuel Weinstein, deceased, by Ellen Weinstein, as executrix of the Will of Samuel Weinstein, deceased.

(10) Appearance of Wells Fargo Bank & Union Trust Co., as executor of the Will of Ellen Weinstein, deceased.

(11) Order of Tax Court for substitution of Estate of Ellen Weinstein, deceased, Wells Fargo Bank & Union Trust Co., executor.

(12) Petition for review.

(13) Notice of filing petition for review and service of same.

(14) Designation of record, proceedings and evidence to be contained in the record on review.

Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

/s/ EUSTACE CULLINAN,

/s/ DELGER TROWBRIDGE,

/s/ O. K. CUSHING,

Attorneys for Petitioners on
Review. [281]

Receipt of copy of the foregoing Designation of Record, Proceedings and Evidence to be Contained in the Record on Review is hereby admitted this 5th day of May, 1947.

/s/ J. P. WENCHEL, C.A.R.,

By

Counsel for Commissioner of
Internal Revenue,
Respondent on Review.

[Endorsed]: Received and filed T.C.U.S. April
28, 1947. [282]

The Tax Court of the United States
Washington 25, D. C.

Docket No. 5007

BLOOMFIELD RANCH, et al.,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent,

CERTIFICATE

I, Victor S. Mersch, clerk of the Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 282, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 20th day of May, 1947.

[Seal] /s/ VICTOR S. MERSCH, EMT
Clerk, the Tax Court of the
United States.

[Endorsed]: No. 11643. United States Circuit Court of Appeals for the Ninth Circuit. Bloomfield Ranch, by James A. Clayton & Co., a Corporation, managing partner, operator and co-owner thereof, and by Florence G. Baldwin, John Derrol Chace, Willis Sherman Clayton, Jr., Arthur D. Curtner, John Kirk Dorrence, Ross L. Fitch, Margaret F. Coykendall, Hugh S. Hersman, Alfred A. Hapgood, George H. Osen, Alfred L. Parkinson, Estate of Andrew R. Patrick, deceased, by Sigurd C. P. Cornett, as executor of the Will of Andrew R. Patrick, deceased, San Jose Hardware Co., a Corporation, Nellie Shillingsburg, Anne Thompson, Sarah Shillingsburg Barry, Margaret Leaman, and Estate of Ellen Weinstein, deceased, by Wells Fargo Bank & Union Trust Co., Executor, substituted for Estate of Samuel Weinstein, deceased, by Ellen Weinstein, as Executrix of the Will of Samuel Weinstein, deceased, partners in and co-owners of Bloomfield Ranch, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Devision of the Tax Court of the United States.

Filed June 3, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 11643

BLOOMFIELD RANCH, et al.,
Petitioners on Review,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

STATEMENT OF POINTS TO BE
RELIED UPON

Now come the Petitioners on Review in the above-entitled cause, by their attorneys, O. K. Cushing, Eustace Cullinan and Delger Trowbridge, and hereby state that they intend to rely upon the following points in this proceeding:

1. The Tax Court erred in failing to find that the petitioners do not constitute an association taxable as a corporation.

2. The Tax Court erred in finding that the Bloomfield Ranch Syndicate is an association taxable as a corporation.

3. The Tax Court erred in holding that there are deficiencies in income tax and declared value excess profits taxes for the year 1940 in the respective amounts of \$6,646.60 and \$4,159.58; and erred in failing to hold that there are no deficiencies in income tax or declared value excess profits taxes for the year 1940.

4. The Tax Court erred in failing to find that each person who paid \$50,000 to Clayton & Co. signed with Clayton & Co. a separate written instrument in the form of Petitioners' Exhibit 1, and that there was no other agreement by any petitioner.

5. The Tax Court erred in finding that the fourteen separate written instruments referred to in its Findings of Fact were signed by each person who contributed to the fund of \$700,000, designated as "Investor."

6. The Tax Court erred in failing to find that there was no agreement by the investors with one another.

7. The Tax Court erred in failing to find that the investors had no meeting before they signed the respective agreements with Clayton & Co. and that some of them did not know who the others were.

8. The Tax Court erred in finding that the agreement provided that "Each investor was entitled to have returned to him the \$50,000 which he advanced, in whole or in part, in the operator's judgment, but no investor was entitled to receive repayment of his contribution before the properties had been converted into cash and all charges and expenses had been fully paid."

9. The Tax Court erred in finding, with respect to said agreement "It was provided that distribution could be made in equal amounts to each investor whenever the operator had a net amount, after payment of charges, of \$7,000 or more on hand."

10. The Tax Court erred in failing to find, on

the contrary, that it was provided in the agreement between each investor and Clayton & Co. that upon the payment of the debts, taxes and charges accrued, any residue of money in the Operator's (Clayton & Co.) hands "shall be distributed equally to said investors whenever there shall be a net amount of \$7,000 or more on hand."

11. The Tax Court erred in failing to hold that such leases as were made and such expenses as were incurred with respect to the property after the year 1930, occurred as the result of the depression and were matters beyond the control of either the Operator or the investors.

12. The Tax Court erred in finding that from 1941 to 1944, 1112 acres were sold for \$541,843.00.

13. The Tax Court erred in finding that the original agreement of each investor had attached to it endorsement of any assignment or transfer of all or part of a one-fourteenth interest which showed how the transfer of the interest came about or was made.

14. The Tax Court erred in holding that the fourteen instruments which were signed by the respective investors constituted a single agreement.

15. The Tax Court erred in holding that the titles to the property were not taken and held by M. E. Thomas in trust for the respective investors.

16. The Tax Court erred in failing to hold that each respective investor was a principal and Clayton & Co. was his agent.

17. The Tax Court erred in holding that Clayton & Co. was given power to deal with the properties as though it was the sole owner, and the Tax Court

erred in failing to hold that the agreement provided in the same connection that the Operator (Clayton & Co.) "may not exchange, encumber, nor lease except as above specified, (for one season only), nor sell trees, wood or improvements off from said property without the consent of the investor."

18. The Tax Court erred in holding that the investors did not have undivided interests in the lands which were purchased, and erred in holding that the investors were not the equitable owners of undivided interests in the property acquired by the investment.

19. The Tax Court erred in failing to hold that the investors were equitable owners of the property acquired and that their beneficial interests were not merely personal claims against the agent, Clayton & Co.

20. The Tax Court erred in holding that the interests of the investors were limited to rights to receive distribution of the net profits to be derived from the operation and sales of the land, and that their beneficial interests were only personal claims against the operator.

21. The Tax Court erred in holding that no investor was entitled, "as of right," to any payment or return "before said property and the proceeds thereof have been converted into cash," and all expenses, debts, charges and commissions had been fully paid; and the Tax Court erred in failing to hold, with respect to the foregoing language, that the agreement also read "provided, however, that upon the payment of the debts, taxes and charges

accrued, such funds shall be distributed equally to said investors whenever there shall be a net amount of \$7,000 or more on hand.”

22. The Tax Court erred in holding that liability was limited to the investment which each investor originally made in the enterprise.

23. The Tax Court erred in failing to hold that the petitioners constituted a partnership as partnership is defined by Section 3797 of the Internal Revenue Code, and Section 29.3797-4 of Regulations 111 or Section 19.3797-4 of Regulations 103.

24. The Tax Court erred in holding that “the acquisition of property for the express purpose of resale at a profit is a business undertaking”; and the Tax Court erred in holding that the purpose of the investment involved in this case was to make profits by “dealing” in real estate.

25. The Tax Court erred in holding “that those who made up a fund of \$700,000 for the purchase of the Miller & Lux property constituted an association, and that respondent has correctly determined that there was an association taxable as a corporation.”

26. The Tax Court erred in failing to hold that those who invested in the purchase of the Miller & Lux property did not constitute an association.

27. The Tax Court erred in holding that the petitioners constitute an association within the definition contained in Section 3797(a) of the Internal Revenue Code, so as to constitute a taxable entity taxable as a corporation.

28. The Tax Court erred in failing to hold that the petitioners do not constitute an association

within the definition contained in Section 3797(a) of the Internal Revenue Code so as to constitute a taxable entity taxable as a corporation.

Petitioners designate the entire record, as certified by the Clerk of the Tax Court of the United States, as necessary for the consideration of the above-mentioned points, except, however, the photo-static copies of the agreements between the respective investors and James A. Clayton & Co., which are annexed to the copies of Petitioners' Exhibit 2 (record pages 192 and 193), Exhibit 3 (record pages 195 and 196), Exhibit 4 (record pages 198 and 199), Exhibit 5 (record pages 201 and 202), Exhibit 6 (record pages 209, 210, 211 and 212), and Exhibit 10 (record pages 218 and 219); each of which is identical with Petitioners' Exhibit 1 (record pages 189 and 190) except as to the name of the investor.

And petitioners request that the record be printed accordingly, and that in lieu of the said agreements, excepted as aforesaid, there be printed in the record a statement that each of said agreements so omitted from the printed record is identical with Petitioners' Exhibit 1 (record pages 189 and 190) except in each case the difference of the name of the investor.

Dated: June 5th, 1947.

/s/ O. K. CUSHING,

/s/ EUSTACE CULLINAN,

/s/ DELGER TROWBRIDGE,

Counsel for Petitioners on
Review.

[Endorsed]: Filed June 5, 1947.

United States Circuit Court of Appeals

For the Ninth Circuit

BLOOMFIELD RANCH, by JAMES A. CLAYTON & Co., a corporation, managing partner, operator and co-owner thereof, and by FLORENCE G. BALDWIN, JOHN DERROL CHACE, WILLIS SHERMAN CLAYTON, JR., ARTHUR D. CURTNER, JOHN KIRK DORRANCE, ROSE L. FITCH, MARGARET F. COYKENDALL, HUGH S. HERSMAN, ALFRED A. HAPGOOD, GEORGE H. OSEN, ALFRED L. PARKINSON, ESTATE OF ANDREW R. PATRICK, deceased, by SIGURD C. P. CORNETT, as executor of the will of Andrew R. Patrick, deceased, SAN JOSE HARDWARE Co., a corporation, NELLIE SHILLINGSBURG, ANNE THOMPSON, SARAH SHILLINGSBURG BARRY, MARGARET LEAMAN, and ESTATE OF ELLEN WEINSTEIN, deceased, by WELLS FARGO BANK & UNION TRUST Co., executor, substituted for Estate of Samuel Weinstein, deceased, by Ellen Weinstein, as executrix of the will of Samuel Weinstein, deceased, partners in and co-owners of Bloomfield Ranch,

Petitioners on Review,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

On Petition for Review of Decision of the Tax Court
of the United States.

BRIEF FOR PETITIONERS.

O. K. CUSHING,
EUSTACE CULLINAN,
DELGER TROWBRIDGE,

Crocker First National Bank Building, San Francisco,

Attorneys for Petitioners.

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IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

BLOOMFIELD RANCH, by JAMES A. CLAYTON & Co.,
a corporation, managing partner, operator and co-
owner thereof, and by FLORENCE G. BALDWIN,
JOHN DERROL CHACE, WILLIS SHERMAN CLAYTON,
JR., ARTHUR D. CURTNER, JOHN KIRK DORRANCE,
ROSE L. FITCH, MARGARET F. COYKENDALL, HUGH
S. HERSMAN, ALFRED A. HAPGOOD, GEORGE H.
OSEN, ALFRED L. PARKINSON, ESTATE OF ANDREW
R. PATRICK, deceased, by SIGURD C. P. CORNETT,
as executor of the will of Andrew R. Patrick,
deceased, SAN JOSE HARDWARE Co., a corporation,
NELLIE SHILLINGSBURG, ANNE THOMPSON, SARAH
SHILLINGSBURG BARRY, MARGARET LEAMAN, and
ESTATE OF ELLEN WEINSTEIN, deceased, by WELLS
FARGO BANK & UNION TRUST Co., executor, sub-
stituted for Estate of Samuel Weinstein, deceased,
by Ellen Weinstein, as executrix of the will of
Samuel Weinstein, deceased, partners in and co-
owners of Bloomfield Ranch,

Petitioners on Review,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

**On Petition for Review of Decision of the Tax Court
of the United States.**

BRIEF FOR PETITIONERS.

JURISDICTION.

This petition for review involves income taxes and declared value excess profits tax for the year 1940. (R. 212.) A partnership return of income for the calendar year 1940 was filed with the Collector of Internal Revenue for the First Collection District of California (R. 212) under the name "Bloomfield Ranch" showing the respective shares of taxable income of petitioners herein in the so-called Bloomfield Ranch properties. (R. 190.) The First Collection District of California is within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit. All the individual petitioners are residents of, and James A. Clayton & Co., the corporate petitioner, has its principal place of business in, the Northern District of California, which is within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit. The notice of deficiency was mailed to the taxpayer on February 28, 1944 (R. 19) in which the Commissioner asserted a deficiency for the year 1940 of \$6,646.60 in income tax liability and \$4,159.58 in declared value excess profits tax liability. Within ninety days after the mailing of the notice of deficiency, petitioners, on May 22, 1944, filed in the Tax Court of the United States their petition for redetermination of that deficiency (R. 3, 6) under the provisions of Section 272(a) (1) of the Internal Revenue Code. On June 30, 1944, the Commissioner of Internal Revenue filed in the Tax Court of the United States his answer to the petition. (R. 3, 23.) The Tax Court of the United States, on January 31, 1947, filed its memorandum of findings of fact and opinion and its

decision (R. 4, 212-227) sustaining the ruling of the Commissioner. The petitioners within three months thereafter, on April 21, 1947, filed in the office of the Clerk of the Tax Court of the United States their petition for review of the decision by the United States Circuit Court of Appeals for the Ninth Circuit (R. 5, 239) pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTIONS PRESENTED.

James A. Clayton & Co. (hereinafter sometimes called "Clayton"), a real estate agent, found thirteen individuals who contributed \$50,000 each, to be used together with \$50,000 contributed by Clayton and money to be borrowed, in purchasing lands, hereinafter referred to as "Bloomfield", for the profitable resale thereof. Each individual investor made a separate agreement with Clayton under which Clayton was to sell the property and distribute the proceeds to the respective investors. Each investor was to be paid his share from time to time whenever there should be a net of \$7,000 or more on hand. The title was taken in the name of M. E. Thomas who made deeds to the buyers when sales were made by Clayton.

The questions are whether, as petitioners contend, petitioners were in 1940 a partnership as that term is defined in Sec. 3797(a) (2) of the Internal Revenue Code; or whether their venture was taxable as a corporation; whether they were carrying on business; and whether the Tax Court erred in holding that peti-

tioners are liable for a deficiency for the year 1940 of \$6,646.60 in income tax liability, and \$4,159.58 in declared value excess profits tax liability.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are set forth in the appendix, *infra*, pp. i-vii.

STATEMENT OF THE CASE.

James A. Clayton & Co. is a corporation, organized under the laws of California, and having its principal place of business in San Jose, in said State, and doing business as a real estate agent and broker. (R. 203, 204.)

Miller & Lux, Incorporated, a corporation, owned 21 separate parcels of land, substantially all ranch land, in the Counties of Santa Clara, San Benito and Santa Cruz, California, containing about 27,500 acres. Clayton, having learned, about the beginning of 1926, that the lands were for sale as a whole, and deeming that they presented a favorable opportunity for purchase and profitable resale in such parcels as the purchasers might require, found thirteen customers willing to go into the investment. Each contributed \$50,000, in January and February of 1926. Clayton also contributed \$50,000. Thus there were fourteen investors. (R. 204-205.)

Clayton and each investor, including Clayton & Co., separately signed agreements dated March 10,

1926. The fourteen respective agreements were identical except for the names of the respective investors (R. 53) and read as follows (R. 167):

\$50,000.00

San Jose, Cal. March 10, 1926

This is to acknowledge receipt by the undersigned, James A. Clayton & Co., a corporation of San Jose, Cal., hereinafter called the "Operator", from J. P. Dorrance of San Jose, hereinafter called the "Investor", of the sum of Fifty Thousand (\$50,000.00) Dollars, which sum is so received by, and paid to, said corporation on the terms and conditions and for the purposes, as hereinafter set forth and not otherwise, to-wit:

The Operator is to use said sum, together with other sums contributed by thirteen other persons, who are also referred to herein as "Investors" and other sums borrowed or advanced by said operator—the unpaid portions thereof, may be re-borrowed or renewed, and security given—in the purchase of certain lands and interests, in the Counties of Santa Clara, San Benito and Santa Cruz, California, belonging to Miller & Lux, Inc., and consisting of approximately 27,000 acres of land, together with divers rights, appurtenances and easements as described in three deeds to M. E. Thomas dated March 3rd, 1926 and recorded March 10th, 1926 in Santa Clara, San Benito and Santa Cruz Counties, Cal.

The Operator is to take and hold title to said properties originally in the name of M. E. Thomas; but may take such title in the name of any other person, corporation or concern, or in its own name; and may have such title conveyed, from time to time, to other persons, corporations or concerns, or otherwise conveyed or held, as the

Operator may desire, in trust for the said 14 investors above referred to, for the profitable resale thereof.

The Operator may sell, convey, hold, lease for one season only, or in any otherwise deal with and treat said properties as the sole and absolute owner thereof in fee simple, and without let or hindrance from the Investor, or any of the Investors, less than the full number thereof, or any other person or concern, whatsoever. But may not exchange, encumber, nor lease except as above specified, nor sell trees, wood or improvements off from said property without the consent of the investors.

The Operator may, from time to time, incur such costs, expenses, and charges in connection with the acquiring, holding, renting, selling or protecting of said properties, as it may deem proper; and the fact of the Operator incurring such cost, expense or charge, shall conclusively establish the propriety and legality thereof.

The Operator shall keep true and accurate books of account, in which shall be set down, from time to time, all moneys paid out and charges, expenses and costs incurred in the premises, and all sales made and properties disposed of, and moneys or other things of value received by it in the premises.

Out of the moneys received from sales or renting or other sources of said properties, the Operator shall first retain for its own use and benefit, a commission of five percentum (5%) on the gross selling price of each parcel sold, as sales are made, and from the net proceeds of such sales, after deduction of its commissions, the Operator shall pay all costs, expenses, and

charges paid or incurred by it in the premises, and all moneys advanced or borrowed by it, together with interest thereon.

From any residue of moneys remaining in the Operator's hands, after all the foregoing payments have been made, the Investor shall be entitled to have returned to him, at the same time, and in equal amounts, as are returned to the other Investors, the whole or such part of the said sum herein receipted for, as may, in the judgment of the Operator, be safely paid, without jeopardy to any remaining properties or assets, not yet converted into cash; but no Investor shall be entitled, as of right, to any payment or return, or repayment before said properties and the proceeds thereof, have been converted into cash, and all such commissions, debts, advances, costs, charges and expenses have been fully paid, provided, however, that upon the payment of the debts, taxes and charges accrued, such funds shall be distributed equally to said Investors whenever there shall be a net amount of \$7000 or more on hand.

When, as, and if all of said properties, and all properties, and all proceeds therefrom shall have been sold and converted into cash, and all such commissions, debts, advances, costs, charges and expenses shall have been fully paid, and all moneys advanced by the Investors shall have been fully repaid, all moneys, if any, then remaining in the hands of the Operator arising out of said transactions, and not applicable to any of the foregoing requirements, shall be, by said Operator, paid to and divided among the Investors, in equal shares to each of them, their heirs and assigns.

It is authorized, understood and agreed, however, that the Operator has charged, and is entitled to a commission of Fifty Thousand (\$50,000.00) Dollars for the negotiation, purchase and consummation of sale of said properties from Miller & Lux, Inc., to said M. E. Thomas, which is in addition to commissions to be credited to it for subsequent resales, and which shall be added to, and included in charges and expenses of the transactions herein provided for, and accounted as part of the original purchase price of said properties.

The Investor shall be entitled to have an account rendered to him by the Operator, of all transactions hereunder, on demand, but not more often than once each sixty days.

These presents are executed in duplicate by the Operator and the Investor, the day and year set out at the opening hereof, and shall be binding upon the successors, heirs, representatives and assigns of each of them.

James A. Clayton & Co.,
By Frazier O. Reed,

Its President,

W. S. Clayton,

Its Secretary,
Operator

J. P. Dorrance,

Investor

The Tax Court made findings, in part as follows:

On March 10, 1926, Clayton paid Miller & Lux \$1,235,000 for the several parcels of land, which were

known as "Bloomfield" and which are referred to hereinafter as Bloomfield, for convenience. Clayton borrowed \$585,000, which with the \$700,000 of the Investors made up \$1,285,000, the purchase price plus the Operator's \$50,000 commission. Titles were taken in the name of M. E. Thomas, an employee of Clayton; notes were signed by her; and deeds of trust were given to two concerns which loaned the borrowed money. (R. 216.)

When the lands were acquired from Miller & Lux, there were leases existing which had been made by Miller & Lux, and the land was taken over subject to the leases. They yielded rents of \$34,041 in 1926. (R. 216.)

During a five year period, 1926 to 1930, inclusive, 90 per cent of the property, about 24,828 acres, were sold for the total sum of \$1,452,326. The loans from Miller & Lux and the Bank were paid by the end of 1927. At the end of 1930, there remained 2,672 acres, unsold. (R. 216-217.)

The depression following the "crash" of October, 1929, depressed the real estate market, generally, and the sales of the property in question fell off after 1930. During ten years, from 1930 to 1940, inclusive, the only sales were sales of 60 acres for rights of way for public services, and but for such sales, no sales would have been made in 1935, 1938, 1939, 1940 and 1942. (R. 217.)

The 42 acres in the town of Gilroy were sold in parcels making up a city block. There was never any

intention of subdividing this acreage into lots, and the Operator [Clayton] refused to sell land in units of less than one block. (R. 217.)

From the beginning, in 1926, Clayton adopted a policy of renting parcels of the acreage under leases to run for one year, subject to renewal for another year; and of keeping some of the acreage under cultivation in wheat or barley, until parcels were sold. When lands were sold, tenants were moved to other locations. The reasons for renting and cultivating the acreage, pending sales, were two-fold: To carry the taxes on the property and to keep the property from going "native," i.e., becoming overgrown with weeds and brush. The Operator paid himself a commission for renting lands. Income from farming and renting was accounted for separately on tax returns. Farming operations were carried on at a loss except in 1930, 1931, and 1934. (R. 217, 218.)

From 1926 through 1940, the operations of Clayton consisted of farming, renting, and selling property; collecting rents and payments of principal and interest on installment sales; paying taxes; disposing of produce raised on farms; and, in general, taking care of the financial and accounting aspects of the venture. (R. 218.)

During the 15-year period, 1926 through 1940, receipts of interest totalled \$156,402.85; profits from sales totalled \$311,766.93; gross receipts from rents totalled \$456,062.91; and miscellaneous receipts totalled \$19,533.97. The total of taxes for the same period was \$224,722.76. (R. 218.)

Sales to and including 1940 totalled \$1,474,243.06. Sales during 1941 to 1944, inclusive, totalled \$352,600. The total gain over the cost of the properties, \$1,285,000, aggregates \$541,843.06. (R. 218.)

Distributions totalling \$98,250 have been made to each holder of the fourteen units, totalling \$1,375,500, which represents return of the original \$700,000 capital plus profits from all operations. (R. 218.)

When the acreage was purchased in 1926, Miller & Lux had put in nine wells and nine pumping units for pumping water. After 1931, when Clayton, and some tenants, turned to truck farming, wet farming; and when dry years reduced the level of water in the ground, Clayton put in some wells and pumps, and made some repairs to existing wells and pumps, at a total cost of \$37,903, of which sum \$8,267 was spent on the Miller & Lux wells and pumps. (R. 218, 219.)

There have not been any exchanges of the Bloomfield property, nor reinvestments in other property.

Frazier O. Reed, president of Clayton, managed the operations. He discussed progress with the Investors when he saw them, individually. He called them all together to meet on three occasions to discuss income tax problems. (R. 219.)

There were originally fourteen Investors and each had a one-fourteenth interest in the venture. Since 1926, changes have occurred in the Investors' interests due to deaths, transfers, and sales of all or part of a one-fourteenth interest, so that there are now nine-

teen Investors holding the original fourteen interests, some holding less than a one-fourteenth interest, and some holding a complete one-fourteenth interest plus part of another one-fourteenth interest. (R. 219.)

SPECIFICATIONS OF ERROR RELIED UPON.

1. The Tax Court erred in failing to find that the petitioners do not constitute an association taxable as a corporation.

2. The Tax Court erred in finding that the Bloomfield Ranch Syndicate is an association taxable as a corporation.

3. The Tax Court erred in holding that there are deficiencies in income tax and declared value excess profits taxes for the year 1940 in the respective amounts of \$6,646.60 and \$4,159.58; and erred in failing to hold that there are no deficiencies in income tax or declared value excess profits taxes for the year 1940.

4. The Tax Court erred in failing to find that each person who paid \$50,000 to Clayton signed with Clayton a separate written instrument in the form of Petitioners' Exhibit 1, and that there was no other agreement by any petitioner.

5. The Tax Court erred in finding that the fourteen separate written instruments referred to in its Findings of Fact were signed by "each person who contributed to the fund of \$700,000, designated as 'Investor'." (R. 213-214.)

6. The Tax Court erred in failing to find that there was no agreement by the Investors with one another.

7. The Tax Court erred in failing to find that the Investors had no meeting before they signed the respective agreements with Clayton and that some of them did not know who the others were.

8. The Tax Court erred in finding that the agreement provided that "Each investor was entitled to have returned to him the \$50,000 which he advanced, in whole or in part, in the operator's judgment, but no investor was entitled to receive repayment of his contribution before the properties had been converted into cash and all charges and expenses had been fully paid".

9. The Tax Court erred in finding, with respect to said agreement "It was provided that distribution could be made in equal amounts to each investor whenever the operator had a net amount, after payment of charges, of \$7,000 or more on hand."

10. The Tax Court erred in failing to find, on the contrary, that it was provided in the agreement between each investor and Clayton that upon the payment of the debts, taxes and charges accrued, any residue of money in the Operator's [Clayton] hands "shall be distributed equally to said investors whenever there shall be a net amount of \$7,000 or more on hand."

11. The Tax Court erred in failing to hold that such leases as were made and such expenses as were

incurred with respect to the property after the year 1930, occurred as the result of the depression and were matters beyond the control of either the Operator or the investors.

12. The Tax Court erred in finding that from 1941 to 1944, 1112 acres were sold for \$541,843.

13. The Tax Court erred in finding that the original agreement of each investor had attached to it endorsement of any assignment or transfer of all or part of a one-fourteenth interest which showed how the transfer of the interest came about or was made.

14. The Tax Court erred in holding that the fourteen instruments which were signed by the respective investors constituted a single agreement.

15. The Tax Court erred in holding that the titles to the property were not taken and held by M. E. Thomas in trust for the respective Investors.

16. The Tax Court erred in failing to hold that each respective investor was a principal and Clayton was his agent.

17. The Tax Court erred in holding that Clayton was given power to deal with the properties as though it was the sole owner, and the Tax Court erred in failing to hold that the agreement provided in the same connection that the Operator [Clayton] "may not exchange, encumber, nor lease except as above specified [for one season only], nor sell trees, wood or improvements off from said property without the consent of the investor."

18. The Tax Court erred in holding that the Investors did not have undivided interests in the lands which were purchased, and erred in holding that the Investors were not the equitable owners of undivided interests in the property acquired by the investment.

19. The Tax Court erred in failing to hold that the Investors were equitable owners of the property acquired and that their beneficial interests were not merely personal claims against the agent, Clayton.

20. The Tax Court erred in holding that the interests of the Investors were limited to rights to receive distribution of the net profits to be derived from the operation and sales of the land, and that their beneficial interests were only personal claims against the operator.

21. The Tax Court erred in holding that no investor was entitled, "as of right", to any payment or return "before said property and the proceeds thereof have been converted into cash", and all expenses, debts, charges and commissions had been fully paid; and the Tax Court erred in failing to hold, with respect to the foregoing language, that the agreement also read "provided, however, that upon the payment of the debts, taxes and charges accrued, such funds shall be distributed equally to said Investors whenever there shall be a net amount of \$7,000 or more on hand."

22. The Tax Court erred in holding that liability was limited to the investment which each investor originally made in the enterprise.

23. The Tax Court erred in failing to hold that the petitioners constituted a partnership as partnership is defined by Section 3797 of the Internal Revenue Code, and Section 29.3797-4 of Regulations 111 or Section 19.3797-4 of Regulations 103.

24. The Tax Court erred in holding that “the acquisition of property for the express purpose of resale at a profit is a business undertaking”; and the Tax Court erred in holding that the purpose of the investment involved in this case was to make profits by “dealing” in real estate.

25. The Tax Court erred in holding “that those who made up a fund of \$700,000 for the purchase of the Miller & Lux property constituted an association, and that respondent has correctly determined that there was an association taxable as a corporation.”

26. The Tax Court erred in failing to hold that those who invested in the purchase of the Miller & Lux property did not constitute an association.

27. The Tax Court erred in holding that the petitioners constitute an association within the definition contained in Section 3797(a) of the Internal Revenue Code, so as to constitute a taxable entity taxable as a corporation.

28. The Tax Court erred in failing to hold that the petitioners do not constitute an association within the definition contained in Section 3797(a) of the Internal Revenue Code so as to constitute a taxable entity taxable as a corporation.

SUMMARY OF ARGUMENT.

Petitioners were joint venturers, owners of undivided equitable interests in real property, each of whom individually and separately appointed an agent to sell the property with such powers as were necessary to that end.

Thomas held the title in trust for each investor separately.

Each investor had a separate equitable estate in the land.

The Tax Court erred in its views as to the right of the Investors to receive their shares of the proceeds of sales and as to the interests of the Investors in the land. If it had not made these errors, it could not have concluded that the Investors did not constitute a partnership as defined in the Internal Revenue Code and that they did constitute an association doing business in the semblance of a corporation.

Clayton was an agent of each investor separately and was not a trustee.

All activities to be performed by Clayton after purchase of the property were those of an agent only.

Clayton never held the title; consequently, it could not be a trustee.

Clayton's duties are stated erroneously in the findings of the Tax Court, with consequent misinterpretation of the agreement.

The petitioners did not constitute an association.

There was nothing here analogous to a corporate board of directors and nothing that looked, even remotely like a corporation.

The case of *Gerstle v. Commissioner*, 95 Fed. (2d) 587, is decisive of the case at bar.

The petitioners were not doing business.

The cases cited by the Tax Court as determinative are distinguishable from the case at bar.

ARGUMENT.

There is no dispute about the facts. The only oral evidence was the testimony of Mr. Frazier O. Reed, President of Clayton, which is one of the petitioners. The other evidence consists of stipulations, tabulations and other documents admitted either by stipulation or without objection, all (except the return of 1940) supplied by the petitioners.

We contend that the petitioners were joint venturers, owners of undivided, equitable interests in real property, which they bought and placed in the name of Thomas. They were tenants in common and each individually and separately appointed Clayton his or her agent to sell his property, with such powers as were necessary to that end.

The Tax Court erred in finding that "the Bloomfield Ranch Syndicate is an association, taxable as a corporation". (R. 219.) Specifications 1, 2, 25, 26, 27, 28, pages 12 and 16 hereof.

The Tax Court erred in holding that there were deficiencies in income tax and declared value excess profits taxes for the year 1940. (R. 227-228.) Specification 3, page 12 hereof.

Section 3797 (a) of the Internal Revenue Code reads in part as follows:

“* * * (2) *Partnership and Partner.* The term ‘partnership’ includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term ‘partner’ includes a member of such a syndicate, group, pool, joint venture, or organization.

“(3) *Corporation.* The term ‘corporation’ includes associations, joint stock companies, and insurance companies.”

See Specification 23, page 16 hereof.

That definition of partnership first appears in the 1932 Revenue Act, Section 1111. As is said in Regulations 103, Section 19.3797-4:

“The Internal Revenue Code *provides its own concept of a partnership.* Under the term ‘partnership’ it includes not only a partnership as known at common law but, as well, a syndicate, group, pool, joint venture, or other unincorporated organization which carries on any *business, financial operation, or venture* and which is not, within the meaning of the Code, a trust, estate, or a corporation. * * *” (Italics supplied.)

In reading the authorities, especially those earlier than 1932, it is necessary to keep in mind the difference between a Code partnership and a common law partnership. A Code partnership may have features incongruous with or additional to the elements of a common law partnership.

From the Code definition it is evident that carrying on a business or seeking gain or profit is not repugnant to the Code conception of partnership. Neither is such a venture or financial operation as sale of land acquired for resale at a profit.

While title to the property was for convenience taken in the name of Thomas, each of the original fourteen Investors paid for a one-fourteenth interest and so each owned an equitable undivided one-fourteenth interest in the land. Thomas was the trustee only of a resulting trust, not of an express trust, and was merely a conduit of the title.

The sole purpose of the group, as expressed in the respective agreements and confirmed by the history of the enterprise, was to buy the Bloomfield Ranch and sell it at a profit. When the Bloomfield Ranch should be sold the venture was to terminate. A continuing business was not contemplated. Capital gain, rather than recurring income, was the profit sought. Awaiting sales, of course, the land had to be kept in good and salable condition, and, to do that, cultivation by the management or by tenants was necessary. Moreover, prudent management required that as much incidental income as possible be earned by the land unsold in order to meet taxes and other ex-

penses. A group that buys an apartment house or office building for the purpose of selling it at a profit does not change the character or purpose of its activity merely by trying to fill the building with good tenants and make it profitable and salable while awaiting a buyer. The depression prolonged the activity of the petitioners, but did not alter their original purpose of selling as soon as buyers could be found at the prices set.

Though the agreement signed by each investor and Clayton contained no provision for transfer of interests, the law recognizes the right of each owner to transfer his property interest in the absence of agreement to the contrary. On his death such interest passed by succession or will. The title had to lodge somewhere. But in this case such interests were not *readily* or conveniently transferable in the way of shares of corporate stock. Though some transfers of interest occurred, none of them released the original investor from any obligation. Clayton was not a party to any transfer of interest. It accepted notice in each instance and acknowledged receipt.

The group had no resemblance to a corporation. No "association" was formed. Each investor, separately, was a principal and Clayton was his agent. The name "Bloomfield Ranch" was only a name of convenience and had no significance with respect to organization as an association or corporation. It was adopted because Miller & Lux objected to the use of their name in connection with sales. (R. 79, 80.) No meetings were held such as corporations hold. There

was no committee resembling a board of directors; there was no organization at all. No entity intervened between the respective investors and the purchasers of the property. Furthermore, there was no intent or plan that such an entity should come into being. (R. 74-76.) That our position is not unreasonable is shown by the fact that for many years the Commissioner took the same position respecting the Bloomfield Ranch. In 1926 Clayton sent a representative to San Francisco to ascertain how the Bloomfield Ranch income tax returns should be filed. He obtained the information and the returns were filed that way until 1930. In 1930 the matter was reviewed and the percentage of cost and the percentage of profits of sales was agreed upon and after that returns were filed as before without any question until the present question regarding the return for 1940 was presented. (R. 119.)

The Tax Court said in its opinion (R. 224):

“Titles were originally taken and held by the Operator in the name of M. E. Thomas, and no change was ever made. The titles were not held by M. E. Thomas in trust.”

This we have specified as error. (Specification 15, page 14 hereof.)

State laws of property such as that declaring that one is a trustee who takes the title to property which is paid for by another, and such as that providing that a trustee must have title to the property held in trust, are binding upon the Federal Courts.

Edward Hines Yellow Pine Trustees v. Martin, 268 U. S. 458, 69 L. Ed. 1050;

Warburton v. White, 176 U. S. 484, 44 L. Ed. 555;

Clarke v. Clarke, 178 U. S. 186, 44 L. Ed. 1028.

THOMAS HELD THE TITLE IN TRUST FOR EACH INVESTOR SEPARATELY.

As we have seen, each of the fourteen Investors contributed \$50,000 to the purchase of the property (the remainder of the purchase price having been borrowed and later repaid) and title was taken in the name of M. E. Thomas.

The *Civil Code of California*, Section 853, provides:

“When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made.”

It seems too plain for argument, that, when each investor paid \$50,000 toward the purchase of the property, and caused title to be taken in the name of Thomas, a trust resulted in favor of each investor and the titles were held by Thomas in trust.

See

Estate of Harris, 9 Cal. (2d) 649, page 660, 72
Pac. (2d) 873,

where it is said:

“It is elementary, however, that if the consideration for the purchase of any property is furnished by a stranger to the title, the holder of the

title, by operation of law, holds the title in trust for the one who furnished the consideration.”

Harris v. Cassells, 202 Cal. 648, 262 Pac. 319;

Riley v. Martinelli, 97 Cal. 575, 32 Pac. 579;

Case v. Coddington, 38 Cal. 191;

Currey v. Allen, 34 Cal. 254.

**EACH INVESTOR HAD A SEPARATE EQUITABLE
ESTATE IN THE LAND.**

The Tax Court erred in holding that the Investors did not have undivided interests in the lands which were purchased, and that they were not the equitable owners of the property. (R. 224.) (Specifications 18, 19, page 15 hereof.)

After stating that the titles were not held by Thomas in trust, the opinion of the Tax Court continues (R. 224):

“Furthermore, the fourteen Investors were not given any undivided interests in the realty which was purchased.”

The Investors bought and paid for the property. They caused title to be conveyed to Thomas. They held undivided equitable interests in the property which must be regarded as the real ownership, the legal estate held by Thomas being no more than “the shadow” following the equitable estate, as said in the *Duffill* case, *infra*.

In

Title Ins. & Trust Co. v. Duffill, 191 Cal. 629,
218 Pac. 14,

it is said, pages 647, 648:

“The generally accepted rule in this country also is that ‘under the system now prevailing the *cestui que trust* is regarded as the real owner of the property, the trustee being merely the depositary of the legal title. His is not a property right, but a legal duty founded upon a personal confidence; his estate is not that which can be enjoyed, but a power that can be exercised.’ (39 Cyc. 203.) Such estates ‘are in equity what legal estates are in law; the ownership of the equitable estate is regarded by equity as the real ownership, and the legal estate is, as has been said, no more than the shadow always following the equitable estate, which is the substance, except where there is a purchaser for value and without notice who has acquired the legal estate.’ ”

In

Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64,

the Court held that Baird held an undivided interest in the title to certain lands for Watson. Baird conveyed to Sutro who, the Court held, took with notice of Watson’s right. Watson sued for partition of the property. His right to partition was sustained.

Capuccio v. Caire, 189 Cal. 514, 209 Pac. 367.

Capuccio was a stockholder in a corporation which forfeited its charter for failure to pay its license tax. The Court, assuming that the former directors held title as trustees for the stockholders, sustained the right of Capuccio, as owner of the equitable title, to maintain a suit for partition.

It follows that each investor was the equitable owner of an undivided 1/14 interest in the land and

hence of the proceeds of the sales. This, no doubt, is why the agreement provided (R. 169) that the funds should be distributed whenever there was on hand \$7,000 net or more. In other words, \$500 for each of the 14 investors.

Indeed the Board of Tax Appeals, in the *Huron* case, 44 B.T.A. 859, 863, said,

“* * * in the *Gerstle* case, which was held to be a joint venture, ‘it seems clear that the members were equitable owners of the property acquired’.”

An equitable title in land is real property.

Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820;

Title Insurance & Trust Co. v. Duffill, 191 Cal.

629, *supra*.

THE TAX COURT ERRED IN ITS VIEWS AS TO THE RIGHT OF THE INVESTORS TO RECEIVE THEIR SHARES OF THE PROCEEDS OF SALES AND AS TO THE INTERESTS OF THE INVESTORS IN THE LAND. IF IT HAD NOT MADE THESE ERRORS, IT COULD NOT HAVE CONCLUDED THAT THE INVESTORS DID NOT CONSTITUTE A PARTNERSHIP AS DEFINED IN THE INTERNAL REVENUE CODE AND THAT THEY DID CONSTITUTE AN ASSOCIATION DOING BUSINESS IN THE SEMBLANCE OF A CORPORATION.

The opinion of the Tax Court continues (R. 224):

“They [the Investors] were given only the right to receive ‘moneys remaining in the Operator’s hands’ after paying all costs, obligations and expenses; they were given the right only to have returned to them, at the same time, in equal amounts, the whole or part of the sum receipted for in each instrument; and no Investor was entitled, ‘as of right’ to any payment or return ‘be-

fore said properties and the proceeds thereof have been converted into cash,* and all expenses, debts, charges, and commissions had been fully paid.” (Italics supplied.)

These statements are in error. (Specifications 20, 21, page 15 hereof.)

The owners were entitled to equal distribution whenever there was a net amount of \$7,000 on hand, and that right was reserved to them by a proviso in the same paragraph of the agreement where the Court found the expression that it quoted “*as of right*”, etc. (R. 169.)

The view of the Tax Court that the investors were not “*given*” interests in the property which they had bought and paid for and which they owned, and that they were “*given*” only the right to receive moneys from the operator’s hands, proceeds of property that they owned, illustrates why the errors that we discuss appear in the opinion and in the findings. As was said by Mr. Justice Holmes in *Guy v. Donald*, 203 U. S. 399, page 406, 51 L. Ed. page 247:

“As long as the matter to be considered is debated in artificial terms there is a danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied.”

The opinion of the Tax Court continues:

“From the terms of the instruments it must be concluded that the interests of the Investors were limited to rights to receive distribution of the

net profits to be derived from the operation and sales of the land; and that their beneficial interests were only personal claims against the Operator; and that the Investors did not have interests in the land itself.” (R. 224, 225.)

That statement is in error. (Specifications 15, 18, 19, 20, pages 14 and 15 hereof.)

The Investors were not limited to rights to receive net profits, but each had his right also to receive his share of the proceeds of the sales as they were made whenever \$7,000 was available. As we have seen the interests of the Investors were real property, and not merely personal claims against the operator.

If the Tax Court had not made that error it could not have found that the Investors did not constitute a partnership, as defined in the Code section, and did constitute an association doing business in semblance of a corporation.

These erroneous views of the Tax Court led it to say (R. 225) :

“The nature of interests of the Investors serves to distinguish this case from the *Gerstle* case where it was held that individuals were joint ventures (sic) and the Circuit Court concluded that they were ‘equitable owners of the property acquired, and that their beneficial interests were not merely personal claims against the syndicate managers.’ ”

On the contrary, as to the title, the *Gerstle* case and the case at bar are on all fours.

In *Commissioner v. Gerstle*, 95 Fed. (2d) 587 (C.C.A. 9, 1938), the title to all the properties that were acquired was taken in the name of one or the other of two title companies (as here the title was taken in the name of Thomas). And this Court said (at p. 590):

“It seems clear that the members were equitable owners of the real property acquired, and that their beneficial interests were not merely personal claims against the syndicate managers.”

**CLAYTON WAS AN AGENT OF EACH INVESTOR SEPARATELY
AND WAS NOT A TRUSTEE.**

(Specification 14, page 14 hereof.)

The agreement designates Clayton throughout as “Operator” (R. 167-170), which, like manager, appropriately designates an agent with broad powers. *Commissioner v. Whitecomb*, 95 Fed. (2d) 596, page 598. The agreement nowhere refers to Clayton as trustee. The Tax Court did not find and did not hold in its opinion that Clayton was a trustee.

Each Investor, by the terms of his agreement with Clayton, provided that the “Operator”, Clayton, was to use the \$50,000 received from the Investor, together with other sums contributed by thirteen other persons, and other sums borrowed, in the purchase of the Miller & Lux lands, as described in three deeds to M. E. Thomas, dated March 3, 1926, and to take and hold title to the properties in the name of Thomas. (R. 167.)

To put it briefly, each Investor said to Clayton, "Take my \$50,000 and with similar sums from thirteen others and money that you are to borrow, buy the Miller & Lux lands and take and hold the title in the name of Thomas." This Clayton did, and in doing so was, of course, merely an agent, not of a group (for there was no agreement with the group) but of each individual separately.

The agreement then provides that the Operator

"* * * may take such title in the name of any other person, corporation or concern, or in its own name; and may have such title conveyed, from time to time, to other persons, corporations or concerns, or otherwise conveyed or held, as the Operator may desire, in trust for the said 14 investors above referred to, *for the profitable resale thereof.*" (R. 167, 168; Italics supplied.)

Title was taken in the name of Thomas, and was conveyed by Thomas from time to time, as buyers were found. No other change in the title has ever been made. The Tax Court said:

"Petitioners contend that they were owners of undivided interests in real property, who had appointed an agent to sell the property, and that while titles were taken in the name of M. E. Thomas, she was only a trustee of a resulting trust." (R. 224.)

That is a correct statement of our position; but the Tax Court further said,

"It appears that petitioners advance the argument here that Clayton Company was a trustee-manager for each Investor." (R. 225.)

We make no such contention. We assert that Clayton was agent for each respective Investor, and nothing more.

All activities to be performed by Clayton after purchase of the property, were those of an agent only.

When the title was transferred to Thomas, all that remained for Clayton to do was to make profitable sale of the property, with incidental care of it in the meantime. That, of course, was a pure matter of agency.

To that end the agreement next provides (R. 168) that:

“The Operator [Clayton] may sell, convey, hold, lease for one season only, or in any otherwise deal with and treat said properties as the sole and absolute owner thereof in fee simple, and without let or hindrance from the Investor, or any of the Investors, less than the full number thereof, or any other person or concern, whatsoever.”

It is significant that while the opinion of the Tax Court states (R. 221) that the Operator was given power “to deal with the properties as though it was the sole owner * * *” the Court omitted to mention in that connection the next sentence in the agreement which reads (Specification 17):

“But may not exchange, encumber, nor lease except as above specified, nor sell trees, wood or improvements off from said property without the consent of the Investors.” (R. 168; Italics supplied.)

The words of the agreement: "or in any otherwise deal with and treat said properties as the sole and absolute owner thereof * * * etc." must be read with, and are limited by, the other terms of the agreement, having in mind that the whole purpose of the venture was the purchase and profitable resale of the property. Having no power to exchange, encumber, or lease except for one season only, the agent's only power was to sell, meanwhile doing what was proper to protect the properties. This is further shown by the provision of the agreement giving Clayton power to incur costs, expenses and charges "in connection with the acquiring, holding, renting, selling or protecting of said properties," (R. 168).

The *Civil Code of California*, Section 2321 provides:

"When an authority is given partly in general and partly in specific terms, the general authority gives no higher powers than those specifically mentioned."

Clayton was required to keep books of account showing all moneys paid out, sales made, properties disposed of and moneys received (R. 168); a provision quite appropriate for instructions to an agent.

When Clayton found a buyer, Thomas made the deed. The effect was the same as if Thomas had held the power of attorney of each Investor and signed the deeds as attorney in fact. Thomas was merely a conduit of the title.

The equitable title to the property (the substance) was in the petitioners, Thomas had the legal title (the shadow); Clayton, the agent, made the sales.

In *Lewis & Co. v. Commissioner*, 301 U. S. 385, 81 L. Ed. 1174 (May 17, 1937), the grantor placed title in a trust company as trustee for herself and Lewis as beneficiaries. Lewis was authorized to exercise management and control of the property for the purpose of sale. Title was to be conveyed by the trustee to purchasers upon Lewis' directions. This was like the case at bar.

The Court described the situation and its legal effects as follows (81 L. Ed. 1175-6):

"If it were not for the declaration of trust, we should have here the simple case of an appointment by a land owner of an agent to subdivide the land and sell it, receiving as compensation for his services a fixed percentage of the payments made by the purchasers. It is quite evident that such an arrangement has no element of substance or method which would warrant its designation as an association under the statutory provision in question. Nor can we see that the intervention of a trustee to hold title, execute contracts and conveyances at the direction of the real-estate agent and make collections alters the situation." * * *

"There is to be found in the operation of the business no essential characteristic of corporate control—nothing analogous to a board of directors or shareholders, no exemption from personal liability, no issue of transferable certificates of interest. There is simply the common relation of

principal and agent, coupled with the collateral incidents of an ordinary trust.”

In *Kilgallon v. Commissioner* (C.C.A. 7, 1938), 96 F. (2d) 337, the Court said of the *Lewis* case (p. 340):

“We think that petitioners are correct in their contention that merely increasing the number of principals and utilizing the device of an agent to represent all the principals would not create an ‘association’ within the meaning of the term as used in Section 701(a)(2). Such an arrangement would in all probability be a partnership, even though the agent’s powers might be so extensive that the partnership would have all the advantages, during the continuance of the agency relationship, of centralized management.”

Clayton never held the title; consequently, it could not be a trustee.

It is the law of California that to create an express trust there must be a transfer of the property to the trustee.

The *Civil Code of California*, Sec. 852, provides:

“*Trust must be in writing.* No trust in relation to real property is valid unless created or declared:

1. By a written instrument, subscribed by the trustee, or by his agent thereto authorized in writing;

2. By the instrument under which the trustee claims the estate affected; or,

3. By operation of law.”

In *Bainbridge v. Stoner*, 16 Cal. (2d) 423, page 428; 106 Pac. (2d) 423, it is said:

“To create an express trust there must be an explicit declaration of trust followed by an actual conveyance or transfer of property to the trustee.”

In *Nichols v. Emery*, 109 Cal. 323, page 330; 41 Pac. 1089, the Court said:

“* * * to the creation of a valid express trust it is essential that some estate or interest should be conveyed to the trustee, and, when the instrument creating the trust is other than a will, that estate or interest must pass immediately.”

See also I. T. 1585, C. B. II-1, page 4, where the Income Tax Unit of the Bureau of Internal Revenue held that where an agent did not hold the legal title, no trust was created.

CLAYTON'S DUTIES ARE STATED ERRONEOUSLY IN THE FINDINGS OF THE TAX COURT, WITH CONSEQUENT MIS-INTERPRETATION OF THE AGREEMENT.

The Tax Court, in its findings, purports to set forth briefly the purpose and terms of the agreements. That summarization is not binding upon this Court for the reason that the instruments of agreement are incorporated in the findings by reference. (R. 214.) Since the findings below referred to are not in accordance with the terms of the agreements, they must be disregarded. The Tax Court found, in paragraph 4 relating to the agreement (R. 215), that

“Each investor was entitled to have returned to him the \$50,000 which he advanced, in whole or in part, in the Operator’s judgment, but no Investor was entitled to receive repayment of his contribution before the properties have been converted into cash and all charges and expenses had been fully paid.”

Also (R. 215), that

“It was provided that distribution *could* (italics ours) be made in equal amounts to each Investor whenever the Operator had a net amount, after payment of charges, of \$7,000 or more on hand.”

These findings are erroneous.

(Specifications 8, 9, and 10.)

At the expense of a brief duplication, we repeat, with italics supplied, a paragraph of the agreements (R. 169) so that the Court may see the effect of this misinterpretation.

“From any residue of moneys remaining in the Operator’s hands, after all the foregoing payments have been made, the Investor shall be entitled to have returned to him, at the same time, and in equal amounts, as are returned to the other Investors, *the whole or such part* of the said sum herein receipted for, as may, in the judgment of the Operator, be safely paid, without jeopardy to any remaining properties or assets, not yet converted into cash; but no Investor shall be entitled, as of right, to any payment or return, or repayment before said properties and the proceeds thereof, have been converted into cash, and all such commissions, debts, advances, costs, charges and expenses have been fully paid, *provided, how-*

ever, that upon the payment of the debts, taxes and charges accrued, such funds shall be distributed equally to said Investors whenever there shall be a net amount of \$7,000 or more on hand." (R. 169.) (Italics supplied.)

The error in stating in the finding the provision that we have italicized makes it appear that distribution of the fund was permissive rather than mandatory, i.e., that distribution *could* be made instead of *must* be made. The finding thus gives the erroneous impression that distribution of the funds whenever there was a net amount of \$7,000 on hand was a matter in the discretion of the Operator, and hence was something like the distribution of dividends of a corporation to stockholders. But the contrary was the fact, as shown by the provision in italics, *supra*, that the funds "*shall be distributed* whenever there shall be a net amount of \$7,000 or more on hand". The Operator had no discretion. This mandatory provision is, of course, peculiarly appropriate to directions by an owner to an agent, and has no resemblance to the methods of distribution by a corporation. This is not only the instruction of the investor to his agent, but, it is the agreement of the agent to comply. There is no intervening entity controlling the fund.

The agreement further provides for payment by *the Operator to the Investors*, in equal shares, of the net proceeds when all the properties were converted into cash. (R. 169, 170.) The language is "** * * shall be, by said Operator paid to and divided among the Investors, in equal shares to each of them, * * **".

Thus there are two provisions in the agreements for payments to the Investors; *one*, whenever there was \$7,000 available; *the other*, when all the properties were sold. Both are mandatory and both require payment to each investor individually. Besides each investor is entitled to an account of all transactions rendered to him by the Operator on demand not more often than once each sixty days. (R. 170.)

THE PETITIONERS DID NOT CONSTITUTE AN ASSOCIATION.

(Specifications of Error Nos. 1 and 2, page 12 hereof.)

The Tax Court erred in finding that the fourteen separate written instruments were signed by each person who contributed to the fund of \$700,000 (R. 215), (Specification 5, page 12 hereof), and in failing to find that each person who paid \$50,000 to Clayton signed a separate agreement and that there was no other agreement. (R. 51, 53) (Specification 4, page 12 hereof.) It also erred in failing to find that there was no agreement by the Investors with one another and that they had no meeting before they signed the agreements and that some of them did not know who the others were. (R. 50, 103, 104.) (Specifications 6 and 7, page 13 hereof.) There is no conflict in the evidence on these points. (R. 50, 53, 100, 104.)

The Investors were co-tenants. In *Burnet v. Burns*, (C.C.A. 8, 1933), 63 Fed. (2d) 313, Burns owned a half interest in a lease, the other half of which was owned

by a syndicate. The Government contended that since the trustees for the syndicate acted both for the members of the syndicate and also for Burns, it must be held that Burns was a member of the syndicate. The Court said (p. 316):

“Certainly one who is a cotenant of a corporation or an association does not render himself liable to pay taxes as a corporation because he permits his cotenant to manage his property and account to him for his share of the profits.”

We have already shown that the Investors were owners of the equitable title to the lands they bought. They were co-tenants. They had no agreement with one another.

C. H. Clovis, 32 B.T.A. 646, resembles the case at bar. The Board in that case quoted from the *Burns* case, at page 657, the language that we have set forth above and on page 653 in describing the Clovis situation used language particularly apposite to the case at bar as follows:

“By the agreement the individuals became tenants in common in their ownership of the property and, so far as the record discloses, continued in such relationship without doing anything further to transfer the legal title to the trustees. *If the agreement, considered together with the predecessor agreements of trust, should be deemed sufficient to vest legal title in the trustees, our holding would have to be that the trustees merely held bare legal title for the tenants in common as a mere convenience, they retaining the beneficial title as tenants in common.* Obviously it would have been cumbersome and impractical to execute

a conveyance to each co-owner of his share of the property. * * * In either event they actually conducted the enterprise, not through an organization, but through an agent, C. E. Clovis. *Some semblance of organization is necessary to result in an association.*" (Italics supplied.)

In *Commissioner v. Rector & Davidson* (C.C.A. 5, 1940), 111 Fed. (2d) 332, four individuals purchased an interest in a mineral lease and vested title to the lease in two of them. The name of Rector & Davidson was assigned to identify the venture. Fractional parts were sold to various individuals; Rector & Davidson were authorized to execute all instruments, control, manage and operate the lease, collect the proceeds, pay all proper expenses and distribute to the owners their proportionate shares of the net proceeds. The Court said (p. 333):

"In the case before us the title was held in undivided interests by all of the participants, and they were tenants in common of realty. Centralized management was obtained, not by shareholders' votes, but by the creation of an agency relation by each co-owner as principal, and without provision for continuity. There was no limitation of personal liability. No stock was issued, no meetings were held, and the enterprise had no office, no seal, no minutes, and no stock books; nor was any trust ever created. In these circumstances, the finding of the Board of Tax Appeals that respondent was a syndicate or joint venture which resembled a partnership more nearly than it did a corporation was a fair and reasonable conclusion, supported by the evidence, and its decision should be affirmed."

There was nothing here analogous to a corporate board of directors, and nothing that looked, even remotely, like a corporation.

The Tax Court erred in holding that the fourteen instruments (separately signed by the respective Investors) constituted a single agreement. (R. 223.) (Specification 14, p. 14 hereof.) There was no inter-relation between the Investors. They invested in a common property; but they had no agreement with one another. Some of them do not know the others. (R. 50.) Each invested but \$50,000 and each by his agreement dealt separately and individually with Clayton only. No investor could have given, and none purported to give, Clayton any instruction as to how Clayton was to deal with the other Investors.

In *McKean v. Scofield* (C.C.A. 5, 1940), 108 F. (2d) 764, where there were several trusts confided to the same trustees, the Court said at page 765:

“That the trusts cover undivided interests in the same properties, that they have the same trustees and identical powers and similar limitations, and that in practice the trustees have dealt with all alike, keeping but one set of books, does not amalgamate or consolidate the trusts or make them one for tax purposes. It was so held even when several such trusts were all created by one grantor and in a single instrument in *United States Trust Co. v. Commissioner*, 296 U. S. 481, 56 S. Ct. 329, 80 L. Ed. 340, and *Helvering v. McIlvaine*, 296 U. S. 488, 56 S. Ct. 332, 80 L. Ed. 345, affirming 7 Cir., 78 F. 2d 787, 102 A.L.R. 252.” * * *

“Nothing in the law, nothing in the trust deeds binds the trusts together, and the fact that the

trustees are the same persons and the property undivided estates in the same realty is not enough. In law the trustees are as separate as though they were different individuals. There has been co-operation between the trusts, but no incorporation."

The Tax Court seemed to think that because Clayton is a corporation, there was thus a provision for a successor for the purpose of holding title and the death of individual participants would not cause any change in the "constitution of the venture". We see no point in this. It would follow that if two co-tenants separately appointed a corporation as their respective agent to sell their property, they would constitute an association. That cannot be the law and the authorities herein so show. To stress the mere fact that the Investors had as their common agent a corporation omits the idea that there must be some organization or body of persons whose control, direction and participation in the conduct of the enterprise bear some resemblance to a corporation. Here we have nothing of that kind. The case is like that of *C. A. Everts et al. v. Commissioner*, 38 B.T.A. 1039 (1938). There Everts sold to various persons fractional interests in an oil and gas lease. Each assignee appointed Everts his agent to act for him in caring for and marketing the oil and gas obtained from the properties. The Board held that there was no association and said, at page 1050:

"In the instant case we have, without doubt, a business enterprise, but we do not have a business trust with corporate attributes as was con-

sidered in the *Morrissey* and its companion cases. Therefore, to find that the petitioners constituted 'associations' taxable as corporations there must be found to exist here some organization or body of persons whose control, direction, and participation in the conduct of that business enterprise bear corporate analogy."

The following language from the *Everts* case (at p. 1050) strikingly describes the situation in the case at bar:

"It is true that each coowner, as such, was necessarily interested in the business enterprise of drilling wells on the Jamison lease and producing oil and gas therefrom for profit. *However, they had no agreement or arrangement among themselves as a group, providing for the essential characteristics of corporate control of the enterprise. They achieved a unity of purpose and operation only through having a common agent. There was nothing analogous to a corporate board of directors with broad powers to manage, direct, and control the enterprise. Instead each coowner, separately and individually, appointed Everts his or her agent with powers and authority expressly delegated and fixed in advance by his or her individual agreement with Everts. There was nothing analogous to corporate shareholders owning transferable certificates of interest. Instead each party in interest was the owner of an undivided interest in real property, which was transferable only as real property.*" (Italics supplied.)

In *Commissioner v. Whitcomb, etc.* (C.C.A. 5, 1938), 95 Fed. (2d) 596, 65 individuals and companies

signed an agreement with each other and with Whitcomb, called manager, which stated that they desired to and did thereby form a syndicate for the purpose of buying and selling shares of the common stock of Coca-Cola Company. The Court affirmed a decision of the Board of Tax Appeals which held that there was no entity to be taxed as a corporation. The Court said, at page 598:

“The manager was not the agent of an aggregation of subscribers, that is to say, of an entity, but the authority was expressly to buy and sell the stock ‘for the account of each subscriber’.

* * *”

The agreements recognize the separate interest that each investor had in the land; for payments were to be made by Clayton to each investor separately, not to the group; and not to Thomas, in whose name the legal title stood; also, each separate investor was entitled to have an account rendered *to him* (not to the group). All transactions between each investor and Clayton were on an individual and not a group basis. Each investor separately paid his money to Clayton for the purchase of the property, each signed a separate agreement with Clayton, funds when available were payable to each investor separately, and accounts were required to be rendered to each investor separately.

In *American Cities Power & Light Corp.*, 38 B.T.A. 74 (1938), companies interested in certain stocks, formed what they called “stock trading accounts” under which stocks were to be bought and sold by

a designated manager for the account of each of the participants, none of whom the agreement provided should be liable for the obligations of the others. The petitioners contended that they were agents of the holders of the participating interests in accounts and that the accounts were not associations. Their contention was sustained by the Board, which said (at p. 81):

“The arrangement in each of the accounts is less like a corporation than that in *Commissioner v. Whitcomb, etc.*, 95 Fed. (2d) 596; *Commissioner v. Gerstle*, 95 Fed. (2d) 587; *Darol Trading Account*, 34 B.T.A. 837.”

In *Stantex Petroleum Co., Trustee*, 38 B.T.A. 269 (1938), the Petroleum Company sold undivided interests of an oil and gas lease and agreed to drill a well at its own expense. As agent for the holders of undivided interests, it sold the output of the wells, and distributed the net proceeds to the lease holders. The Board said (at p. 272):

“Exclusive of the amount collected for itself, such income as was derived from the wells was collected by the Stantex Petroleum Co. as agent or trustee for its co-tenants. See *Commissioner v. Whitcomb-Coca Cola Syndicate*; 95 Fed. (2d) 596; *Mark L. Gerstle*, 33 B.T.A. 830; *affd.*, 95 Fed. (2d) 857.”

**THE CASE OF GERSTLE v. COMMISSIONER (C.C.A. 9, 1938), 95
FED. (2d) 597, IS DECISIVE OF THE CASE AT BAR.**

The syndicates there involved were held not to be taxable as corporations.

The Tax Court said, in its opinion in the case at bar (R. 225):

“The nature of interests of the Investors serves to distinguish this case from the Gerstle case where it was held that the individuals were joint ventures (sic), and the Circuit Court concluded that they were ‘equitable owners of the property acquired, and that their beneficial interests were not merely personal claims against the syndicate managers’.”

As in the *Everts* case *supra*, the Investors here achieved unity of action only by having a common agent.

If we parallel certain similarities of and differences between the *Gerstle* case and the case at bar, it will be seen that the Gerstle Syndicates more closely resembled a corporation than do the Investors in the case at bar.

1. In the *Gerstle* case the members of one syndicate contributed to a pool using the aggregate amount to purchase certain properties which they believed could be quickly resold at a profit. The management of the properties was intended to be such only as would be necessarily incident to the ownership during the interim between purchase and sale.¹

¹*Gerstle*, 33 B.T.A. 830, at p. 832: “The members of the first syndicate * * * decided to contribute to a pool, using the aggre-

In the case at bar there was no concerted action of the Investors, each of whom dealt with Clayton separately, but the purpose and intention were the same as those of the syndicate members in the *Gerstle* case.

2. In the *Gerstle* case the one agreement was signed by all the parties, thus making the transaction more like an association than in the case at bar where there was no common agreement. (R. 53.)

3. The *Gerstle* agreement gave the syndicate managers complete discretion in the selection of the properties to be purchased, the amount of purchase price, details of management, terms of sale and all other matters related to syndicate operations.²

In the case at bar specifically designated property was to be bought, and sold, and Clayton (with narrower powers than those given the *Gerstle* managers) was appointed agent for that purpose by each investor individually and separately.

4. In the *Gerstle* case it was provided that the title to properties purchased might be taken in any

gate amount for the purposes of purchasing the properties thereafter acquired. At the outset it was their purpose and intention to purchase certain properties which they believed could be quickly resold at a profit and distribute the profits proportionately among the members. * * * The management of the properties and the collection of rents and payment of taxes, interest, etc., was intended to be such only as would be necessarily incident to the ownership in the interim between the purchase and expected sale."

²*Gerstle*, 33 B.T.A. 830, at page 832: "The Syndicate Managers * * * shall have complete discretion in the selection of the properties to be purchased, the amount of the purchase price, the details of management, the terms of sale and of mortgage, and of all other matters related to the Syndicate operations."

name or names the Syndicate Managers determined and title was held by two Title Companies.³

In the case at bar it was specifically provided that title be taken originally in the name of M. E. Thomas and, as stated in the opinion of the Tax Court (R. 224):

“Titles were originally taken and held by the Operator in the name of M. E. Thomas, and no change was ever made.”

5. In the *Gerstle* case the Board said that after the several ventures were launched, it appeared that the peak of real estate values had been reached, the market declined and the expected prompt profitable resale of the properties became impossible. This situation forced the Gerstle Syndicates Managers to undertake certain activities not contemplated by the original plan, such as the demolishing of buildings.⁴

³*Gerstle*, 33 B.T.A. 830, at page 832: “The properties purchased may be taken in any name or names that the Syndicate Managers may determine.”

⁴*Gerstle*, 33 B.T.A. 830, at page 834: “After the syndicates were launched on their several ventures and had acquired their various properties, it appeared that the peak of value had been reached in the real estate market in the city of Oakland. The expected increase in value failed to materialize. On the contrary, the market suffered a decided decline, which continued throughout the years in question and later. By reason of these circumstances the expected prompt profitable resale of the properties became impossible.” And at page 838: “No opportunity for sale presenting itself and it appearing to the syndicate members that because of the depression then existing no such sale could reasonably be expected, the buildings were demolished on February 28, 1929, the members at that time believing that they could dispose of the holding more readily if they were in a position to sell the land either as a unit or in parcels carved therefrom.”

So also in the case at bar the depression in real estate values stopped immediate sale and required the continued operation of the properties. (R. 140, 209.) See Specification 11, pages 13-14 hereof. However, the operations of the Gerstle Managers went further than those of Clayton in the case at bar. The mere fact that there were more properties in the case at bar and consequently more time was required to sell them, makes no difference in principle.

6. In the *Gerstle* case the syndicates as such had no name, no office, except as that of the fiscal agent could be so considered, no officers except as the managers could be so considered, no stationery, no by-laws, no books of record except accounts kept by the fiscal agent.⁵

The Investors here as such had no common name, no office and no officers; certainly Clayton as the agent for the individual Investors could not be so considered; they had no stationery, no by-laws and no books of record. The account kept by Clayton was the same form of account that Clayton keeps in any case where it is acting as agent. (R. 74, 75, 76, 77, 80.)

⁵*Gerstle*, 33 B.T.A. 830, at page 835: "The syndicates, as such, had no name; no office, except in so far as the office of the American Trust Co., as fiscal agent of the syndicates, could be so considered; no officers, save in so far as the syndicate managers could be so considered; no stationery; and no bylaws or other regulatory rules, save as the same may be contained in the several syndicate agreements. No stated meetings were provided for or held; no books of record of any kind were kept by the syndicates as such, except those kept for their account by the fiscal agent; no issue of capital stock or other similar evidence of beneficial interest was provided for or ever issued. The agreements provided the sole evidence of the interest of the several members, and each member received an executed counterpart thereof. Except for the agreements, there was no formal organization."

7. In the *Gerstle* case, there was no capital stock nor certificates of beneficial interest and the agreements provided the sole evidence of the interest of the several members and except for the agreement (executed by all members) there was no formal organization.⁶

In the case at bar there was no capital stock nor were there certificates of beneficial interest. The agreements executed separately and individually by each investor and Clayton did not even provide for the informal organization inferentially found in the *Gerstle* case. Thus the Gerstle Syndicates more closely resembled corporations.

8. The members of the Gerstle Syndicates informally met and discussed syndicate affairs and policies.⁷

In the case at bar the Investors never met except in two or three instances when some of them met to discuss tax matters. (R. 76.)

9. In the *Gerstle* case it was said (33 B. T. A. 830) that the only persons who might be said to stand in

⁶See note 5, *supra*.

⁷*Gerstle*, 33 B.T.A. 830, at pages 835, 836: "The affairs of the syndicate were discussed informally by the members. On the occasional meetings of the directorate of the Emporium or the Emporium Capwell Corporation and on such other occasions as they happened to meet, the several members of the syndicates consulted with each other concerning the policies to be pursued at any given time. While the agreements gave to the syndicate managers broad and exclusive powers, the practice was to decide all questions of importance only after the views of all concerned had been obtained. These views were obtained either on the occasions of the meetings of the members in their capacity as directors referred to, or by telephonic communication between the various members of the syndicates referred to, or on any other occasion when they happened to meet, either in a business or social way * * *."

the position of officers or directors were the managers, and they did not act as such.

The case at bar is even less like a corporation; there were no officers nor directors.

10. In the *Gerstle* case neither the managers nor any member held legal title to any of the syndicate real estate, title was held by two title companies.⁸

In the case at bar the legal title was held by Thomas.

11. In the *Gerstle* case the syndicates were not organized with the idea of remaining in existence any substantial length of time nor of actively operating any business. Nor was it intended to improve the properties. Management was to be only such as was necessary and incident to ownership during the interim between purchase and sale. (33 B.T.A. 830, p. 840.)

The same is true in the case at bar. It is true that it involved much more property, which, as pointed out in the opinion of the Tax Court, required a longer time to sell. The principal delay, however, was caused by the depression, with the result that during a period of ten years, from 1930 to 1940, there were virtually no sales, and during that time, of course, the unsold properties required care, including renting or farming. At no time was the original purpose of the profitable resale of the properties changed. (R. 87.)

The Board, using the following language held the *Gertsle* syndicates not taxable as associations (33 B. T.A. at page 840):

⁸*Gerstle*, 33 B.T.A. 830.

“We conclude that the syndicates were not associations taxable as corporations. See *The Highlands, etc., Trust No. 1546*, 32 B.T.A. 760.

“The syndicates here involved meet the tests of the definition of joint ventures. A joint venture is ‘a special combination of two or more persons, where, in some specific venture, a profit is jointly sought, without actual partnership or corporate designation.’ *Bowmaster v. Carroll*, 23 Fed. (2d) 825; *Motter v. Smyth*, 77 Fed. (2d) 77. Property acquired by participants in a joint venture for the purposes of the venture is the property of the participants, *McCausey v. Burnet*, 50 Fed. (2d) 491; as tenants in common, *Clark v. Sidway*, 142 U.S. 682.”

This Court, affirming the ruling of the Board of Tax Appeals in the *Gerstle* case, remarked that certain of the features that were mentioned in the *Morrissey* case (296 U.S. 344; 80 L. Ed. 263) as incident to corporate organization were present in the *Gerstle Syndicates*, saying (95 F. (2d) 587 at p. 589):

“While title to the assets was not taken in the supposed entity or in the syndicate managers, continuity of the enterprises was effected, insuring against disturbance resulting from death or from the transfer of ownership of beneficial interests.”

This, no doubt, has reference to the fact that the title to the properties was placed in the name of title companies; as here title was placed in the name of Thomas.

This Court, in the *Gerstle* case, mentioned two characteristic advantages of corporate organization,

viz., "limited liability of the members, and a ready divisability and transferability of beneficial interests, making toward the inclusion in the enterprise of large numbers of participants," and said (p. 589):

"The liability of the syndicate members was not limited. Their beneficial interests were not readily or conveniently transferable."

Such too was the situation in the case at bar.

We submit that the *Gerstle* case is determinative of the case at bar and on the authority of that case alone the decision of the Tax Court should be reversed.

THE PETITIONERS WERE NOT DOING BUSINESS.

(Specification 24, page 16 hereof.)

We think that we have shown that the decision of the Tax Court is in error in holding that petitioners here are taxable as an association; and if so, that the decision should be reversed.

Moreover, the decision of the Tax Court must be reversed if the petitioners were not doing business, even though it were deemed that they were an "association".

Here Thomas held title to the property in trust, as we have shown; but without power to do any kind of business. *Cleveland Trust Co. v. Commissioner* (C.C.A. 6, 1940), 115 Fed. (2d) 481. The Court there said, at page 483:

"Business, itself, is a word of large and indefinite import. It is that which occupies the time, attention and labor of men for profit. The word

'business' in its present connection connotes a commercial or industrial establishment or enterprise. The distinction between it and 'property' must be clearly kept in mind in applying the taxing statute here. Business in the sense in which it is here used means the activity, the energy, the capacity, the opportunities by which results are reached, the doing of the varied commercial acts and taking of the requisite steps from which result conclusions and conditions.

"The mere receipt of income from leased property and its distribution to cestuis que trustent amounts to no more than receiving the ordinary fruits that arise from the ownership of property and does not constitute doing business. *McCoach v. Minehill Railway Co.*, 228 U.S. 295, 306, 33 S. Ct. 419, 57 L.Ed. 842."

The intention of the Investors was to sell the land as soon as possible. There was no intention to engage in operating or leasing the land for a profit. This intention was never changed. (Specification 11, pages 13-14 hereof.) The stock market crash in October, 1929, made itself felt in the sale of country land during the year 1930. The effect of the depression was such that while by the end of 1930 over 90 per cent of the acreage, viz., 24,828 acres, had been sold for \$1,452,-326.06, during the next 10 years 60 acres only were sold for \$21,917.00. There would have been no sales in 1935, 1938, 1939, 1940 and 1942 were it not that the land that was sold was required for rights of way for public purposes. (R. 209.) There is a mistake in the findings as to the amount realized from sales after 1940 the amount is stated as \$541,843 (R. 217) it

should be \$352,600 (R. 218, 189), (Specification 12, page 14 hereof) but it is immaterial.

Efforts to sell the land were continued through 1932, but were relaxed as they became ineffectual because efforts to press sales when there was no market would have produced a harmful effect later when the market should again become active. No reasonable offer was made or refused. The property was not withdrawn from sale. (R. 87.)

Confronted with this condition Clayton had no recourse except (until sales could be made) to operate or rent portions suitable for farming of the then remaining 2,605 acres in order to prevent them from deteriorating and to avoid loss. If the land were ever to be sold it had to be kept in good condition. That was done as a maintenance and salvage operation. But there was no deviation from the original intention to sell the properties as soon as possible. The wait was longer than the Investors expected, but the policy, to sell the land at a profit, was never changed. (R. 86, 87.)

The Tax Court found:

“The reasons for renting and cultivating the acreage, pending sales were two-fold: To carry the taxes on the property and to keep the property from going ‘native’, i.e., becoming overgrown with weeds and brush.” (R. 217.)

From the time when the lands were acquired in March, 1926, and while selling was most active, Clayton had made leases for one season only of some of the lands under offer of sale and had farmed other portions of the unsold acreage in order to keep the

lands clean and salable, and to meet the taxes and earn incidental income if possible without interfering with the selling operation. (R. 83.)

As these one-season leases expired some were renewed for one season only at a time on lands not then sold.

The practice of renting lands when possible and farming them when necessary, while awaiting buyers, was adopted from the first and was never changed. It was prolonged beyond first expectations because the depression came and lingered. (R. 84, 87.)

No part of the funds originally contributed by the Investors, and no other money, has been invested, or reinvested, to acquire other lands or property, and no exchange of any property has been made. Sales were made only for money and some capital was distributed to the Investors on each sale except small sales made during the depression. All money that has come to the possession of Clayton has been distributed to the Investors as rapidly as possible. There has been no extension of the enterprise into new fields or activities. (R. 87.)

The Tax Court erred in holding that the acquisition of property for the express purpose of resale at a profit is a business undertaking, and erred in holding that the purpose of the investment involved in this case was to make profits by "dealing" in real estate.

(Specification 24, page 16 hereof.)

In *Huron River Syndicate*, 44 B.T.A. 859 (1941), the Board said (pp. 863-864):

“Finally, the original purpose of the *Gerstle* syndicates was the purchase and immediate resale of the respective properties and only business reverses were responsible for its modification; * * * so that it is questionable whether the *Gerstle* ventures were originally intended as the vehicle for carrying on a business. This is a prerequisite to taxability as a corporation, *Chase National Bank of the City of New York, Trustee*, 41 B.T.A. 430, and in fact the Board found that the *Gerstle* syndicates ‘were not organized with the idea of remaining in existence for any substantial length of time or of actively operating in business * * *.’” (Italics supplied.)

Darol Trading Account v. Commissioner, 34 B.T.A. 837 (July, 1936).

In the *Darol* case a group entered a venture to purchase and sell a block of stock. The Board said, after quoting the *Morrissey* case (at p. 839):

“By no stretch of the imagination could it be said that this petitioner was ‘carrying on’ a business enterprise, within the reasonable interpretation of those words as used by the Supreme Court.”

In *Helvering v. Washburn* (C.C.A. 8, 1938), 99 Fed. (2d) 478, upon the death of Washburn, his son, by agreement with the persons having beneficial interests, took title to the property and in turn executed certificates of beneficial interest in the so-called South Texas Syndicate. The purpose in holding the property was to make a profitable sale at the earliest practicable date. The property was leased for grazing

purposes and the income from the leases constituted nearly all the income. With one or two exceptions, no leases for a period of more than one or two years were entered into by the trustee. The Court said, page 481:

“As said by the Board of Tax Appeals in its opinion: ‘*There was not an association of individuals in this case for the purpose of carrying on a business.* Washburn simply continued the relationship to the other beneficial owners which his father had with them. All parties have been interested in the sale of the property. Continuous efforts have been made to effect a sale. * * * Greater rentals could be realized if the trust were willing to make long-term leases which would not contain a provision for cancellation upon the sale of its land. This indicates very clearly that there has been no attempt on the part of the trust to *operate a business for profit*.’” (Italics supplied.)

It also cited *Commissioner v. Atherton* (C.C.A. 9), 50 Fed. (2d) 740, where it was said, at page 742:

“In the instant case the trustees are holding parcels of land for an opportunity to sell, collecting rents and paying taxes and distributing available funds, and it is a strict trust.”

In the *Washburn* case the Court, after citing the *Morrissey* case, the *Lewis* case and others, said (p. 481):

“If there is a purpose of immediate liquidation as soon as circumstances will permit, and the carrying on of business is only incidental and necessary for the preservation of the property, no taxable association has resulted.”

In *Pitzman, et al., Trustees*, 36 B.T.A. 81 (June, 1937), certain individuals owning as tenants in common a large tract of land, especially adapted for industrial sites, created successive trusts for the management and disposition of the land, the Board said (p. 93):

“The record shows that the trustees were disposing of the property by sale and lease upon terms which they considered to be the best interest of the beneficiaries. It may well be that the sale of this property could have been accelerated by a radical reduction in the sale price, but the law does not require the trustees to sacrifice property in order to hurriedly complete liquidation.”

and said (p. 94):

“The primary purpose in the beginning was to sell and dispose of the property and divide the proceeds. That purpose was manifest throughout both trusts, and handling of the property by the trustees was consistent to that end. They were not only awaiting an opportunity to sell, but were active in soliciting purchasers. Under these circumstances we do not think the time element in the trust agreements and the delay in making sales have the effect of stamping these trusts as business rather than liquidating trusts.”

The Board further said (pp. 94-95):

“The development included repairs to roads, levees, and tenant houses. * * * Purchases of approximately four acres of land were testified to and reasons amply justifying each purchase were given, one for dedication of land to the Illinois State highway system, and the other to

close a local roadhouse and gambling resort which was considered harmful to the trust property. We are unable to find in any activity of the trustees an indication that they were conducting a business for profit. Every activity testified to or otherwise shown by the record squares with the purpose of conserving and protecting the trust corpus until such time as it could be sold or disposed of.” (Citing *Dauphin Deposit Trust Co., Trustee*, 21 B.T.A. 1214.)

It is clear from the foregoing that a profit motive is not equivalent to a business purpose.

Southern Pile Fabric Co. v. Commissioner, Tax Court Memorandum Decision Docket No. 4968, 3 T. C.M. (C.C.H.) 1264, C.C.H. Dec. No. 14,267 (M), entered November 30, 1944.

A trust which held title to certain land and buildings during the interval from the completion of the building until the time when the prospective purchaser executed its contract to purchase the same was held not to be an association taxable as a corporation. The Tax Court said:

“There was no conduct of business in the ordinary sense of the word, and it was not contemplated by the parties that there should be any business operations, but that the trustee should act as the conduit through which the rentals should be received, the necessary insurance premiums, taxes and fees paid, and the remainder of the receipts distributed to the beneficiaries. The operation was not changed by reason of the fact that the time for the completion of the purchase was extended on three different occasions and the

purchase actually completed approximately fifteen years after the execution of the original contract instead of the five years originally contemplated.”

We are not unmindful of the language of this Court in *Commissioner v. Atherton* (U.C.A. 9, 1931), 50 Fed. (2d) 740, where it said (p. 742):

“The controlling feature of a trust is an association of individuals for administration of an estate for liquidation and equitable distribution, and the controlling distinction of an association is an association of individuals for administration of an estate for convenience and profit.”

But we submit that the three cases last above cited show that, though petitioners here were not administering an *estate* for liquidation, what was done in this case was no more carrying on business than was what was done in those cases. The parties in those cases were looking to capital gains, just as were petitioners here. We see no difference in principle.

Any business, financial operation or venture, whether conducted by a partnership or a corporation, is assumed to be inspired by the profit motive. To “carry on” a business (the phrase used in section 3797 of the Internal Revenue Code) implies an intention to carry on a business through an indefinite series of transactions to seek profits rather than capital gains. It implies a continuity of business purpose.

The opinion of the Tax Court cites *Sloan v. Commissioner*, 24 B.T.A. 61, 63 Fed. (2d) 666; *Adelaide*

Park Land, 25 B.T.A. 211; and *Bing & Bing, Inc.*, 35 B.T.A. 1170; to the point that the acquisition of property for the express purpose of resale at a profit is a business undertaking. The cases do not sustain the point, for in each of those cases the entity under consideration had power to improve the property that it was buying and selling, and indeed in the *Bing* case the powers were virtually without limit.

**THE CASES CITED BY THE TAX COURT AS DETERMINATIVE
ARE DISTINGUISHABLE FROM THE CASE AT BAR.**

The Tax Court, in its opinion (R. 220) cited, as controlling the question whether there was an association taxable as a corporation, *Morrissey v. Commissioner*, 296 U.S. 344, 80 L.Ed. 263; *Helvering v. Combs*, 296 U.S. 365, 80 L.Ed. 275; *Huron River Syndicate*, 44 B.T.A. 859; *Helm & Smith Syndicate v. Commissioner*, 136 Fed. (2d) 440; *Bing & Bing, Inc.*, 35 B.T.A. 1170; and *Kilgallon v. Commissioner*, 96 Fed. (2d) 337.

They are all distinguishable from the case at bar.

In *Morrissey v. Commissioner*, *supra*, and *Helvering v. Combs*, *supra*, the title to the property was held by trustees who were charged with the performance of all activities in connection with the enterprise. In the case at bar, the legal title to the property was held by Thomas in trust for the respective petitioners, who as equitable owners and tenants in common carried on all activities through their agent Clayton.

In *Huron River Syndicate*, 44 B.T.A. 859, *supra*, the declaration of trust expressly provided that the interests of the beneficiaries (at p. 861):

“are not interests in the property enumerated and forming the subject of said trust, but are the rights to the performance of said trust and the distribution of the net profits to be derived therefrom and distribution of any trust property remaining on termination of said trust according to the foregoing declaration. Said interest is personal estate and not real estate.” (Italics supplied.)

The individuals there also agreed that if the enterprise should be transformed into a corporation,

“the duties which petitioner would then perform as director, president, and manager would be ‘as nearly as may be the duties which he has undertaken hereunder as trustee’; thus indicating that his relationship to the participants in the enterprise was to be as nearly as possible comparable to that of the managing officer of a corporation.”

In *Helm & Smith Syndicate v. Commissioner* (C.C.A. 9, 1943), 136 Fed. (2d) 440, there were three successive forms of organization. The first and third were trusts which were held to be associations taxable as corporations. These were distinguished by this Court, on page 441, from the *Gerstle* case [(C.C.A. 9, 1938), 95 Fed. (2d) 587)] *supra*, and the *Rector & Davidson* case [(C.C.A. 5, 1940), 111 Fed. (2d) 332] *supra*, this Court saying:

“The provision for a governing directorate with the usual managerial functions distinguishes this case from *Commissioner v. Gerstle* * * * and *Commissioner v. Rector & Davidson* * * *.”

And, we may add, distinguish it from the instant case. In the second form of organization in the *Helm* case (136 Fed. (2d), foot of page 440), each of the beneficiaries under the trust conveyed his former beneficial interest in the trust to Helm, who, as their agent, administered the property formerly held in the trust. In that respect it was like the case at bar. That agency continued but a short time during which Helm leased certain of the property and sold a parcel thereof receiving income therefrom in that period. This Court said (pp. 441, 442):

“We are unable to see any ground for the Tax Court’s holding that the income from the sales and leasing by Helm after the dissolution of the first trust was income to an association under the Act, and hold that such income was not so taxable.”

The *Helm* case thus makes very clear the distinction between the instant case as decided by the Tax Court and, as we see it, where Clayton, like Helm, is an agent, and there is no association taxable as a corporation.

Bing & Bing, Inc., 35 B.T.A. 1170, is cited by the Tax Court as one of the cases by which it says the question here is controlled. (R. 223.) The Tax Court also says, “The facts show that the Bloomfield or the Miller & Lux Syndicate was substantially the same as the Carbarn Syndicate in Bing & Bing, Inc.” In

Bing & Bing, Inc., contrary to the situation here, the manager was to use the funds contributed, for various purposes described “*and for such other purposes as in the judgment of the manager may be advisable*”, (italics supplied), 35 B.T.A. p. 1170, 1171. The same syndicate that was considered in *Bing & Bing* was also considered in *Glenmore Securities Corp.*, 24 B.T.A. 697, and we learn from the language of the agreement quoted there, pp. 698 and 699, “*the amount of the moneys to constitute said Car barn Syndicate Fund shall be determined solely by the Manager and shall be increased or diminished in amount from time to time at any time as determined by the Manager in its sole discretion*”. (Italics supplied.) The agreement further provided, 24 B.T.A. p. 699, that when the Syndicate was terminated at the option of the manager there should be a distribution of all assets and profits “*though there may be a partial distribution at any time prior thereto in the discretion of the Manager*”. (Italics supplied.) The power given to the manager to determine the amount of money to constitute the fund, which might be increased or diminished from time to time as determined by the manager in its sole discretion, and also the right to determine when the Syndicate should terminate, and also the discretion given to it as to when distributions should be made, coupled with the power to use the funds contributed for such purposes as in its judgment might be advisable, bring into the *Bing* case elements of corporate financial structure and capital funds for a continuing enterprise closely resembling those exist-

ing in a corporation, none of which appear in the case at bar.

The Tax Court also cites the *Bing* case to show that the acquisition of property for the express purpose of resale at a profit is a business undertaking. (R. 221.) This suggestion is fully answered by the provisions of the agreement in the *Bing* case, which go far beyond the acquisition of property for resale. There the fund subscribed was to be used for “the *purchase, ownership, sale, management, development and/or exchange* of said above described premises *and/or improvement by construction of buildings or other structures on the said described premises and for the payment of any and all expenses, costs and other disbursements incident thereto, and for such other purposes as in the judgment of the Manager may be advisable.*” (Italics supplied.) It is noteworthy that the managers in the *Bing* case brought about the incorporation of Temple Terrace Construction Company for the purpose of building thirty houses in Temple Terrace Subdivision, Tampa, Florida, and the Syndicate members were called on to contribute to that purpose and later made further advances in an endeavor to save losses in that transaction.

We think the *Bing* case needs no further discussion.

Kilgallon v. Commissioner (C.C.A. 7, 1938), 96 Fed. (2d) 337, also cited by the Tax Court as a controlling case, differs radically from the case at bar. There the trust agreement, Article I, declared (96 Fed. (2d) 337) the object of the trust to be “*the acquisition, management, improvement and disposition*

*of the said premises and of such other property as may be acquired from time to time * * **" (italics supplied), and Article III provided, in part "And the beneficiaries can have no claim, right, title or interest, legal or equitable in the land or other assets or property at any time held by the Trustee under this Trust, but their interest shall be only an interest in the net avails or proceeds thereof, which interest shall be assignable and salable in whole, or in part, and shall be construed to be and shall be personal property". The Court said (96 Fed. (2d), page 339):

"The combined powers of the trustee and managers, taken together with the provisions which created transferable interest, resulted in a centralization and continuity of control by reason of such power, and prevented any interruption in the continuity of the enterprise, through change of ownership of interest, *by separating the interests entirely from the land and making them personal property and assignable and salable as such.*" (Italics supplied.)

It is respectfully submitted that the Tax Court erred in holding that petitioners constitute an association taxable as a corporation, and that there are deficiencies in income tax and declared value excess profits taxes for the year 1940 in the respective amounts of \$6,646.60 and \$4,159.58; and erred in failing to hold that there are no deficiencies in income tax or declared value excess profits taxes for the year 1940.

(Specifications 1, 2, 3, 23, 25, 26, 27, 28, pages 12 and 16 hereof.)

Wherefore, petitioners pray that the decision of the Tax Court be reversed.

Dated, San Francisco,
September 5, 1947.

O. K. CUSHING,
EUSTACE CULLINAN,
DEIGER TROWBRIDGE,
Attorneys for Petitioners.

(Appendix Follows.)

Appendix.



Appendix

STATUTES AND REGULATIONS INVOLVED.

“Sec. 3797 [Internal Revenue Code]. (a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

“(2) Partnership and Partner.—The term ‘partnership’ includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term ‘partner’ includes a member in such a syndicate, group, pool, joint venture, or organization.

“(3) Corporation.—The term ‘corporation’ includes associations, joint-stock companies, and insurance companies.”

* * * * *

“(b) Includes and including.—The terms ‘includes’ and ‘including’ when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined.”

“Regulation Sec. 19.3797-1. *Classification of taxables*.—For the purpose of taxation the Internal Revenue Code makes its own classification and prescribes its own standards of classification. Local law is of no

importance in this connection. Thus a trust may be classed as a trust or as an association (and, therefore, as a corporation), depending upon its nature or its activities. (See [Reg.] section 19.3797-3.) The term 'partnership' is not limited to the common law meaning of partnership, but is broader in its scope and includes groups not commonly called partnerships. (See [Reg.] section 19.3797-4.) The term 'corporation' is not limited to the artificial entity usually known as a corporation, but includes also an association, a trust classed as an association because of its nature or its activities, a joint-stock company, an insurance company, and certain kinds of partnerships. (See [Reg.] sections 19.3797-2 and 19.3797-4.) The definitions, terms, and classifications, as set forth in [Code] section 3797, shall have the same respective meaning and scope in these regulations."

"Regulation Sec. 19.3797-2. *Association*.—The term 'association' is not used in the Internal Revenue Code in any narrow or technical sense. It includes any organization, created for the transaction of designated affairs, or the attainment of some object, which, like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity. It is immaterial whether such organization is created by an agreement, a declaration of trust, a statute, or otherwise. It includes a voluntary association, a joint-stock association or company, a 'business' trust, a 'Massachusetts'

trust, a 'common law' trust, an 'investment' trust (whether of the fixed or the management type), an interinsurance exchange operating through an attorney in fact, a partnership association, and any other type of organization (by whatever name known) which is not, within the meaning of the Code, a trust or an estate, or a partnership. If the conduct of the affairs of a corporation continues after the expiration of its charter, or the termination of its existence, it becomes an association."

"Regulation Sec. 19.3797-3. *Association distinguished from trust.*—The term 'trust,' as used in the Internal Revenue Code, refers to an ordinary trust, namely, one created by will or by declaration of the trustees or the grantor, the trustees of which take title to the property for the purpose of protecting or conserving it as customarily required under the ordinary rules applied in chancery and probate courts. The beneficiaries of such a trust generally do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. Even though the beneficiaries do create such a trust, it is ordinarily done to conserve the trust property without undertaking any activity not strictly necessary to the attainment of that object.

"As distinguished from the ordinary trust described in the preceding paragraph is an arrangement whereby the legal title to the property is conveyed to trustees (or a trustee) who, under a declaration or agreement of trust, hold and manage the property with a view to income or profit for the benefit of beneficiaries.

Such an arrangement is designed (whether expressly or otherwise) to afford a medium whereby an income or profit-seeking activity may be carried on through a substitute for an organization such as a voluntary association or a joint-stock company or a corporation, thus obtaining the advantages of those forms of organization without their disadvantages. The nature and purpose of a cooperative undertaking will differentiate it from an ordinary trust. The purpose will not be considered narrower than that which is formally set forth in the instrument under which the activities of the trust are conducted.

“If a trust is an undertaking or arrangement conducted for income or profit, the capital or property of the trust being supplied by the beneficiaries, and if the trustees or other designated persons are, in effect, the managers of the undertaking or arrangement, whether the beneficiaries do or do not appoint or control them, the beneficiaries are to be treated as voluntarily joining or cooperating with each other in the trust, just as do members of an association, and the undertaking or arrangement is deemed to be an association classified by the Internal Revenue Code as a corporation. However, the fact that the capital or property of the trust is not supplied by the beneficiaries is not sufficient reason in itself for classifying the arrangement as an ordinary trust rather than as an association.

“By means of such a trust the disadvantages of an ordinary partnership are avoided, and the trust form affords the advantages of unity of management and

continuity of existence which are characteristic of both associations and corporations. This trust form also affords the advantages of capacity, as a unit, to acquire, hold, and dispose of property and the ability to sue and be sued by strangers or members, which are characteristic of a corporation; and also frequently affords the limitation of liability and other advantages characteristic of a corporation. These advantages which the trust form provides are frequently referred to as resemblance to the general form, mode of procedure, or effectiveness in action, of an association or a corporation, or as a 'quasi-corporate form.' The effectiveness in action in the case of a trust or of a corporation does not depend upon technical arrangements or devices such as the appointment or election of a president, secretary, treasurer, or other 'officer,' the use of a 'seal,' the issuance of certificates to the beneficiaries, the holding of meetings by managers or beneficiaries, the use of a 'charter' or 'by-laws,' the existence of 'control' by the beneficiaries over the affairs of the organization, or upon other minor elements. They serve to emphasize the fact that an organization possessing them should be treated as a corporation, but they are not essential to such classification, for the fundamental benefits enjoyed by a corporation, as outlined above, are attained, in the case of a trust, by the use of the trust form itself. The Internal Revenue Code disregards the technical distinction between a trust agreement (or declaration) and ordinary articles of association or a corporate charter, and all other differences of detail. It treats

such a trust according to its essential nature, namely, as an association. This is true whether the beneficiaries form the trust or, by purchase or otherwise, acquire an interest in an existing trust.

“The mere size or amount of capital invested in the trust is of no importance. Sometimes the activity of the trust is a small venture or enterprise, such as the division and sale of a parcel of land, the erection of a building, or the care and rental of an office building or apartment house; sometimes the activity is a trade or business on a much larger scale. The distinction is that between the activity or purpose for which an ordinary strict trust of the traditional type would be created, and the activity or purpose for which a corporation for profit might have been formed.”

“Regulation Sec. 19.3797-4. *Partnerships*.—The Internal Revenue Code provides its own concept of a partnership. Under the term ‘partnership’ it includes not only a partnership as known at common law but, as well, a syndicate, group, pool, joint venture, or other unincorporated organization which carries on any business, financial operation, or venture, and which is not, within the meaning of the Code, a trust, estate, or a corporation. On the other hand the Code classifies under the term ‘corporation’ an association or joint-stock company, the members of which may be subject to the personal liability of partners. If an organization is not interrupted by the death of a member or by a change in ownership of a participating interest during the agreed period of its existence, and its management is centralized in one or

more persons in their representative capacities, such an organization is an association, taxable as a corporation. As to the characteristics of an association, see also [Reg.] sections 19.3797-2 and 19.3797-3. The following examples will illustrate some phases of these distinctions:

“(1) If A and B buy some acreage for the purpose of subdivision, they are joint adventurers, and the joint venture is classified by the Internal Revenue Code as a partnership.

“(2) A, B, and C contribute \$10,000 each for the purpose of buying and selling real estate. If A, B, C, or D, an outside party (or any combination of them as long as the approval of each participant is not required for syndicate action), takes control of the money, property and business of the enterprise, and the syndicate is not terminated on the death of any of the participants, the syndicate is classified as an association.”

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

BLOOMFIELD RANCH, BY JAMES A. CLAYTON & Co., A CORPORATION, MANAGING PARTNER, OPERATOR AND CO-OWNER THEREOF, AND BY FLORENCE G. BALDWIN, JOHN DERROL CHACE, WILLIS SHERMAN CLAYTON, JR., ARTHUR D. CURTNER, JOHN KIRK DORRENCE, ROSE L. FITCH, MARGARET F. COYKENDALL, HUGH S. HERSMAN, ALFRED A. HAPGOOD, GEORGE H. OSEN, ALFRED L. PARKINSON, ESTATE OF ANDREW R. PATRICK, DECEASED, BY SIGURD C. P. CORNETT, AS EXECUTOR OF THE WILL OF ANDREW R. PATRICK, DECEASED, SAN JOSE HARDWARE Co., A CORPORATION, NELLIE SHILLINGSBURG, ANNE THOMPSON, SARAH SHILLINGSBURG BARRY, MARGARET LEAMAN, AND ESTATE OF ELLEN WEINSTEIN, DECEASED, BY WELLS FARGO BANK & UNION TRUST Co., EXECUTOR, SUBSTITUTED FOR ESTATE OF SAMUEL WEINSTEIN, DECEASED, BY ELLEN WEINSTEIN, AS EXECUTRIX OF THE WILL OF SAMUEL WEINSTEIN, DECEASED, PARTNERS IN AND CO-OWNERS OF BLOOMFIELD RANCH, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

THERON LAMAR CAUDLE,
Assistant Attorney General.

HELEN R. CARLOSS,
HARRY BAUM,

Special Assistants to the Attorney General.

FILED

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11643

BLOOMFIELD RANCH, BY JAMES A. CLAYTON & Co., A CORPORATION, MANAGING PARTNER, OPERATOR AND CO-OWNER THEREOF, AND BY FLORENCE G. BALDWIN, JOHN DERROL CHACE, WILLIS SHERMAN CLAYTON, JR., ARTHUR D. CURTNER, JOHN KIRK DORRENCE, ROSE L. FITCH, MARGARET F. COYKENDALL, HUGH S. HERSMAN, ALFRED A. HAPGOOD, GEORGE H. OSEN, ALFRED L. PARKINSON, ESTATE OF ANDREW R. PATRICK, DECEASED, BY SIGURD C. P. CORNETT, AS EXECUTOR OF THE WILL OF ANDREW R. PATRICK, DECEASED, SAN JOSE HARDWARE Co., A CORPORATION, NELLIE SHILLINGSBURG, ANNE THOMPSON, SARAH SHILLINGSBURG BARRY, MARGARET LEAMAN, AND ESTATE OF ELLEN WEINSTEIN, DECEASED, BY WELLS FARGO BANK & UNION TRUST Co., EXECUTOR, SUBSTITUTED FOR ESTATE OF SAMUEL WEINSTEIN, DECEASED, BY ELLEN WEINSTEIN, AS EXECUTRIX OF THE WILL OF SAMUEL WEINSTEIN, DECEASED, PARTNERS IN AND CO-OWNERS OF BLOOMFIELD RANCH, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum opinion of the Tax Court (R. 212-227) is not reported.

JURISDICTION

This petition for review (R. 239-241) involves federal income and declared value excess profits taxes for the taxable year 1940. On February 28, 1944, the Commissioner of Internal Revenue mailed to the taxpayer notice of deficiency in the total amount of \$10,806.18. (R. 19-22.) Within ninety days thereafter and on May 22, 1944, the taxpayer filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 272 of the Internal Revenue Code. (R. 6-22.) The decision of the Tax Court sustaining the deficiency was entered January 31, 1947. (R. 227-228.) The case is brought to this Court by a petition for review filed April 21, 1947 (R. 239-241), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether the Tax Court erred in sustaining the Commissioner's determination that taxpayer is an association taxable as a corporation under Section 3797 (a) (3) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

These appear in the Appendix, *infra*.

STATEMENT

The facts as stipulated (R. 202-211) and found by the Tax Court (R. 212-219) may be summarized as follows:

In 1926 James A. Clayton & Company (hereafter called "Clayton Company"), a real estate agent, in-

duced 13 of its customers to join with it in the purchase of 21 separate parcels of California land from its then owner, Miller & Lux, Inc. The parcels were widely scattered in 3 counties, contained about 27,500 acres suitable for various agricultural purposes, and also contained 42 acres of city property. Miller & Lux, Inc. had operated the properties as one going concern for raising cattle and feed and for conducting some farming operations, employing at times as many as 200 men. Clayton Company and the 13 individuals who joined with it each invested \$50,000 (a total of \$700,000) and formed a syndicate known as Bloomfield Ranch, hereafter referred to as "taxpayer".¹ The agreement of the parties was represented by 14 separate but identical written instruments signed by Clayton Company as "Operator" and by each participant as "Investor". (R. 212-214.) After acknowledging receipt of \$50,000 by the Operator from the Investor, the agreement (incorporated by reference in the Tax Court's findings (R. 214)) provided as follows (R. 167-170):

The Operator is to use said sum, together with other sums contributed by thirteen other persons, who are also referred to herein as "Investors" and other sums borrowed or advanced by said Operator—the unpaid portions thereof, may be re-borrowed or renewed, and security given—in the purchase of certain lands and interests, in the counties of Santa

¹ While Bloomfield Ranch is referred to as "taxpayer", the petitioners in this proceeding are its 19 outstanding members. It filed a partnership return for the taxable year (R. 190), in which the members were described as partners (R. 194).

Clara, San Benito and Santa Cruz, California, belonging to Miller & Lux, Inc., and consisting of approximately 27,000 acres of land, together with divers rights, appurtenances and easements as described in three deeds to M. E. Thomas dated March 3rd, 1926, and recorded March 10th, 1926, in Santa Clara, San Benito and Santa Cruz Counties, Cal.

The Operator is to take and hold title to said properties originally in the name of M. E. Thomas; but may take such title in the name of any other person, corporation or concern, or in its own name; and may have such title conveyed, from time to time, to other persons, corporations or concerns, or otherwise conveyed or held, as the Operator may desire, in trust for the said 14 investors above referred to, for the profitable resale thereof.

The Operator may sell, convey, hold, lease for one season only, or in any otherwise deal with and treat said properties as the sole and absolute owner thereof in fee simple, and without let or hindrance from the Investor, or any of the Investors, less than the full number thereof, or any other person or concern, whatsoever. But may not exchange, encumber, nor lease except as above specified, nor sell trees, wood or improvements off from said property without the consent of the investors.

The Operator may, from time to time, incur such costs, expenses, and charges in connection with the acquiring, holding, renting, selling or protecting of said properties, as it may deem proper; and the fact of the Operator incurring such cost, expense or charge, shall conclusively establish the propriety and legality thereof.

The Operator shall keep true and accurate books of account, in which shall be set down, from time to time, all moneys paid out and charges, expenses and costs incurred in the premises, and all sales made and properties disposed of, and moneys or other things of value received by it in the premises.

Out of the moneys received from sales or renting or other sources of said properties, the Operator shall first retain for its own use and benefit, a commission of five per centum (5%) on the gross selling price of each parcel sold, as sales are made, and from the net proceeds of such sales, after deduction of its commissions, the Operator shall pay all costs, expenses, and charges paid or incurred by it in the premises, and all moneys advanced or borrowed by it, together with interest thereon.

From any residue of moneys remaining in the Operator's hands, after all the foregoing payments have been made, the Investor shall be entitled to have returned to him, at the same time, and in equal amounts, as are returned to the other Investors, the whole or such part of the said sum herein receipted for, as may, in the judgment of the Operator, be safely paid, without jeopardy to any remaining properties or assets, not yet converted into cash; but no Investor shall be entitled, as of right, to any payment or return, or repayment before said properties and the proceeds thereof, have been converted into cash, and all such commissions, debts, advances, costs, charges and expenses have been fully paid, provided, however, that upon the payment of the debts, taxes and charges accrued, such funds shall be distributed equally

to said Investors whenever there shall be a net amount of \$7000 or more on hand.

When, as, and if all of said properties, and all properties, and all proceeds therefrom shall have been sold and converted into cash, and all such commissions, debts, advances, costs, charges and expenses shall have been fully paid, and all moneys advanced by the Investors shall have been fully repaid, all moneys, if any, then remaining in the hands of the Operator arising out of said transactions, and not applicable to any of the foregoing requirements, shall be, by said Operator, paid to and divided among the Investors, in equal shares to each of them, their heirs and assigns.

It is authorized, understood and agreed, however, that the Operator has charged, and is entitled to a commission of Fifty Thousand (\$50,000.00) Dollars for the negotiation, purchase and consummation of sale of said properties from Miller & Lux, Inc., to said M. E. Thomas, which is in addition to commissions to be credited to it for subsequent resales, and which shall be added to, and included in charges and expenses of the transactions herein provided for, and accounted as part of the original purchase price of said properties.

The Investor shall be entitled to have an account rendered to him by the Operator, of all transactions hereunder, on demand, but not more often than once each sixty days.

These presents are executed in duplicate by the Operator and the Investor, the day and year set out at the opening hereof, and shall be binding upon the successors, heirs, representatives and assigns of each of them.

In March of 1926 Clayton Company paid Miller & Lux, Inc. \$1,235,000 for the properties. It borrowed \$585,000 which, with the \$700,000 contributed by the Investors, covered the purchase price plus its commission of \$50,000. Titles were taken in the name of one Thomas, an employee. (R. 216.) The properties were purchased subject to outstanding leases which had been made by Miller & Lux, Inc., and the rentals from these leases amounted to \$34,041 in 1926. (R. 216.) Miller & Lux had installed 9 wells and pumping units on the properties, and Clayton Company installed some new ones and repaired the old ones at a total cost of \$37,903. (R. 218-219.)

From 1926 through the taxable year (1940) the operations of Clayton Company consisted of farming, renting, and selling the properties; collecting rents and payments of principal and interest on installment sales; paying taxes; disposing of its farm products; and in general attending to financial and accounting aspects of the venture. (R. 218.) From the beginning it adopted a policy of renting parcels under one-year leases subject to renewal, and of keeping some of the acreage under cultivation in wheat and barley until parcels were sold; this was done both to carry taxes and keep the properties from going "native". (R. 217.) From 1926 through 1930, 90% of the properties had been sold, and by the end of 1927 Clayton Company had repaid the \$585,000 it had borrowed as part of the purchase price of the properties. After 1930 sales dropped sharply due to the depression, and only 60 acres were sold in the next 10 years. There was never any intention to subdivide the 42 acres of

city property into lots, and Clayton Company refused to sell this acreage in units of less than one city block. (R. 216-217.) During the fifteen-year period from 1926 through 1940 interest received totalled \$156,402.85, profits from sales totalled \$311,766.93; gross rentals totalled \$456,062.91; and miscellaneous receipts totalled \$19,533.97. Total gain over the cost of the properties amounted to \$541,843.06. (R. 218.) Income from farming and rent was accounted for separately on tax returns; with the exception of 3 years the farming operations were conducted at a loss. (R. 217-218.)

Distributions totaling \$98,250 have been made on each of the 14 investment units, or a total of \$1,375,500. This represents a return of the original \$700,000 capital invested in the enterprise plus profits from all operations. (R. 218.)

Changes have occurred in ownership of the Investors' interests due to deaths, transfers and sales of all or a part of the original 14 investor units. There are now 19 Investors holding the original 14 interests, some holding less and others holding more than a $\frac{1}{14}$ interest. Whenever any change in Investor interests occurred Clayton Company was notified and made formal acknowledgement and record of the change. The original agreement of each Investor had attached to it endorsement of any transfer. (R. 219.)

Taxpayer reported its income for the taxable year as a partnership. (R. 190, 212.) The Commissioner determined that the enterprise was an "association" taxable as a corporation under Section 3797 (a) (3) of the Internal Revenue Code, resulting in the de-

iciencies in controversy. (R. 21-22.) The Tax Court sustained this determination. (R. 219, 227-228.)

SUMMARY OF ARGUMENT

Under principles established by the Supreme Court, embodied in the long-standing Regulations, and consistently applied by this Court and other Circuit Courts of Appeals, the Tax Court was clearly justified in classifying taxpayer as an "association" taxable as a corporation. Taxpayer was organized for business purposes by a group of "Investors" who jointly contributed capital to the enterprise and received the profits in proportion to their participating interests. With the possible exception of one feature (limited liability) whose absence is not decisive, the organization possessed the salient features of a conventional corporation: centralized management, continuity of existence, and transferability of the interests of the participants. Taxpayer's contention that it was merely a liquidating trust disregards the terms of the agreement under which it was organized as well as the uncontroverted facts, and is also incompatible with its simultaneous insistence that it was a partnership for tax purposes. The cases upon which it relies are not comparable and do not warrant reversal of the decision below.

ARGUMENT

The Tax Court correctly held that taxpayer is an association taxable as a corporation under Section 3797 (a) (3) of the Internal Revenue Code

Taxpayer reported its income for the taxable year as a partnership. (R. 190.) Its current members

(the petitioners herein) are described as partners in the return (R. 194), and so represent themselves in this proceeding (R. 2, 212). The Tax Court, sustaining the Commissioner's determination, concluded that taxpayer was an "association" taxable as a corporation under Section 3797 (a) (3) of the Internal Revenue Code (Appendix, *infra*). (R. 219, 227.) We submit that the Tax Court's conclusion is not only warranted but demanded by the record.

The Internal Revenue Code makes its own classification of business enterprises for federal income tax purposes.² Section 3797 (a) (2) (Appendix, *infra*) defines a partnership as including any joint venture or other unincorporated organization "which is not, within the meaning of this title, a trust or estate or a corporation". Section 3797 (a) (3) in turn defines a corporation as including "associations". The principles determinative of whether an unincorporated organization is an association, and hence to be treated as a corporation for tax purposes, were laid down by the Supreme Court in *Morrissey v. Commissioner*, 296 U. S. 344, and the companion cases of *Swanson v. Commissioner*, 296 U. S. 362, *Helvering v. Combs*, 296 U. S. 365, and *Helvering v. Coleman-Gilbert*, 296 U. S. 369. These principles are embodied in the long-standing applicable Treasury Regulations (Sections 19.3797-1 to 19.3797-5 of Treasury Regulations 103

² Taxpayer's reliance upon state law (Br. 22-25, 32, 34-35) is misplaced. *Bark-Waggoner Assn. v. Hopkins*, 269 U. S. 110; *Morrissey v. Commissioner*, 296 U. S. 344; *United States v. Homcrest Tract*, 160 F. 2d 150 (C. C. A. 9th); *Coast Carton Co. v. Commissioner*, 149 F. 2d 739 (C. C. A. 9th); *Sherman v. Commissioner*, 146 F. 2d 219 (C. C. A. 6th).

(Appendix, *infra*)), which set forth the tests to be applied and the factors to be weighed in ascertaining whether an organization is an association, a trust, or a partnership for tax purposes. Since the statutory provisions to which these Regulations are addressed have been repeatedly reenacted by Congress, they must be deemed to have received implied legislative approval. *Coast Carton Co. v. Commissioner*, 149 F. 2d 739, 741 (C. C. A. 9th); *Commissioner v. Security-First Nat. Bank*, 148 F. 2d 937, 940 (C. C. A. 9th); *Sherman v. Commissioner*, 146 F. 2d 219 (C. C. A. 6th).

This Court³ and other Circuit Courts of Appeals⁴ have had frequent occasion to deal with the question

³ *United States v. Homcrest Tract*, *supra*; *Commissioner v. Security-First Nat. Bank*, *supra*; *Helm & Smith Syndicate v. Commissioner*, 136 F. 2d 440; *Lombard Trustees v. Commissioner*, 136 F. 2d 22; *Porter v. Commissioner*, 130 F. 2d 276; *Kettleman Hills R. S. No. 1 v. Commissioner*, 116 F. 2d 382, certiorari denied, 313 U. S. 582; *Jackson v. United States*, 110 F. 2d 574; *United States v. Trust No. B. I. 35, Etc.*, 107 F. 2d 22; *Title Insurance & Trust Co. v. Commissioner*, 100 F. 2d 482; *Thrash Lease Trust v. Commissioner*, 99 F. 2d 925, certiorari denied, 306 U. S. 654; *Commissioner v. Vandegrift R. & Inv. Co.*, 82 F. 2d 387; *Coast Carton Co. v. Commissioner*, *supra*; *Commissioner v. Gerstle*, 95 F. 2d 587.

⁴ See, e. g., *Wabash Oil & Gas Ass'n v. Commissioner*, 160 F. 2d 658 (C. C. A. 1st), certiorari denied, June 9, 1947; *Bordages Estate Trust v. Commissioner*, 159 F. 2d 62 (C. C. A. 5th); *Fletcher v. Clark*, 150 F. 2d 239 (C. C. A. 10th), certiorari denied, 326 U. S. 763; *Poplar Bluff Printing Co. v. Commissioner*, 149 F. 2d 1016 (C. C. A. 8th); *Sherman v. Commissioner*, 146 F. 2d 219 (C. C. A. 6th); *National Metropolitan Bank v. Commissioner*, 145 F. 2d 649 (C. C. A. 4th); *Adkins Properties v. Commissioner*, 143 F. 2d 380 (C. C. A. 5th); *Commissioner v. City Nat. Bank & T. Co.*, 142 F. 2d 771 (C. C. A. 10th), certiorari denied, 323 U. S. 764; *United States v. Hill*, 142 F. 2d 622 (C. C. A. 10th); *Pennsylvania Co. for Insurance, Etc. v. Uniter States*, 138 F. 2d 869 (C. C. A.

here presented, and no useful purpose would be served by an elaborate survey of the applicable principles and the legion of cases in this field. Suffice to reiterate, as the Regulations provide and the cases uniformly hold, that any association of persons organized for the purpose of sharing the profits of a business venture and possessing organizational advantages of a conventional corporation is an "association" taxable as a corporation, irrespective of the forms employed or the label placed upon the organization by the parties. "The inclusion of associations with corporations implies resemblance; but it is resemblance and not identity". *Morrissey v. Commissioner, supra*,

2d), certiorari denied, 321 U. S. 788; *Sibley Syndicate v. Commissioner*, 131 F. 2d 224 (C. C. A. 6th), certiorari denied, 318 U. S. 786; *Keating-Snyder Trust v. Commissioner*, 126 F. 2d 860 (C. C. A. 5th); *Commissioner v. Nebo Oil Co., Trust*, 126 F. 2d 148 (C. C. A. 10th), certiorari denied, 317 U. S. 636; *Second Carey Trust v. Helvering*, 126 F. 2d 526 (App. D. C.), certiorari denied, 317 U. S. 642; *Commissioner v. Fortney Oil Co., Etc.*, 125 F. 2d 995 (C. C. A. 6th); *Nashville Trust Co. v. Cotros*, 120 F. 2d 157 (C. C. A. 6th), amended, 122 F. 2d 326, certiorari denied, 314 U. S. 680; *Fidelity-Bankers Trust Co. v. Helvering*, 113 F. 2d 14 (App. D. C.), certiorari denied, 310 U. S. 649; *Del Mar Addition v. Commissioner*, 113 F. 2d 410 (C. C. A. 5th); *Sears v. Hassett*, 111 F. 2d 931 (C. C. A. 1st); *Marshall's Heirs v. Commissioner*, 111 F. 2d 935 (C. C. A. 3d), certiorari denied, 311 U. S. 658; *Hamilton Depositors Corp. v. Nicholas*, 111 F. 2d 385 (C. C. A. 10th); *Ross Lewis Trust v. Commissioner*, 110 F. 2d 937 (C. C. A. 10th); *Wellston Hills Syndicate Fund v. Commissioner*, 101 F. 2d 924 (C. C. A. 5th); *Kilgallon v. Commissioner*, 96 F. 2d 337 (C. C. A. 7th), certiorari denied, 305 U. S. 622; *Bert v. Helvering*, 92 F. 2d 491 (App. D. C.); *United States v. Rayburn*, 91 F. 2d 162 (C. C. A. 8th); *Solomon v. Commissioner*, 89 F. 2d 569 (C. C. A. 5th), certiorari denied, 302 U. S. 692; *Brooklyn Trust Co. v. Commissioner*, 80 F. 2d 865 (C. C. A. 2d), certiorari denied, 298 U. S. 659; cf. *Titus v. United States*, 150 F. 2d 508 (C. C. A. 10th).

p. 357. And whether the organization is sufficiently analogous to a corporation to justify taxation of its income as such depends on whether it possesses some or all of the following salient features: (1) centralized management; (2) continuity of title; (3) continuity of existence, uninterrupted by the death of a participant; (4) transferability of the interests of the participants; and (5) limited personal liability of the participants. With respect to “partnerships” vis-à-vis “associations”, the Regulations provide, *inter alia* (Section 19.3797-4):

On the other hand the Code classifies under the term “corporation” an association or joint-stock company, the members of which may be subject to the personal liability of partners. If an organization is not interrupted by the death of a member or by a change in ownership of a participating interest during the agreed period of its existence, and its management is centralized in one or more persons in their representative capacities, such an organization is an association, taxable as a corporation.

The instant organization was created by an agreement between the “Operator” (Clayton Company) and 14 “Investors”. (R. 167-170, 213-214.) When it is tested by the established criteria there can be no doubt that the Tax Court was warranted in concluding that it was an association, not a partnership or trust. With the possible exception of the limited liability feature—whose absence would not be controlling anyway⁵—the

⁵ As the Tax Court observed (R. 226-227), it is not clear from the agreement whether liability of the Investors to third parties was limited, although it would seem so. In any event, “limitation of the beneficiary’s liability is not a sine qua non of the corporate

organization possessed all the salient features of a conventional corporation. (1) Management of the enterprise was unquestionably centralized in the Operator. (R. 167-168, 217-218.) (2) Continuity of title was assured by the provisions authorizing the Operator to take title in the name of its employee, Thomas, or "in the name of any other person, corporation or concern, or in its own name." (R. 167, 216, 224.)⁶ (3) Continuity of the enterprise was not interrupted by the death of any Investor; the profits were to be divided among them or their "heirs and assigns", and the agreement was binding on the "successors, heirs, representatives and assigns" of each Investor. (R. 170.) (4) The interests of the 14 original Investors were transferable and have been transferred in whole or in part by death, sale or assignment; in each instance the Operator made formal acknowledgment and record of the transfer, and there are now 19 Investors (the petitioners herein) holding varying portions of the original 14 Investor interests. (R. 171-186, 219.)

If we understand taxpayer's extended argument correctly, its chief contention is that the Investors

analogy". *Helm & Smith Syndicate v. Commissioner, supra*, p. 441. See also *Burk-Waggoner Assn. v. Hopkins, supra*; *Del Mar Addition v. Commissioner, supra*, p. 411; *Bert v. Helvering, supra*, p. 495; *Pennsylvania Co. for Insurances, Etc. v. United States, supra*, p. 874; *Fletcher v. Clark, supra*. Section 19.3797-4 of Treasury Regulations 103.

⁶ Cf. *United States v. Homcrest Tract, supra*, fn. 8, p. 153; *Wabash Oil & Gas Ass'n v. Commissioner, supra*; *Wellston Hills Syndicate Fund v. Commissioner, supra*. The Operator was also authorized to convey the title to others in trust for the Investors (R. 167-168); it never did so, but kept the title in its employee Thomas (R. 224).

did not associate themselves in a profit-seeking enterprise, but merely created separate liquidating trusts of which the Operator's employee (Thomas) was trustee and the Operator was manager. (Br. 17-18, 38-45.) The contention is patently untenable; it disregards the plain tenor of the agreement between the Operator and the Investors, the uncontroverted facts, the applicable Regulations, and the controlling decisions.

To begin with, taxpayer's claim that the Investors acted "individually and separately" (Br. 17) is irreconcilable with its simultaneous insistence that they were "joint venturers" (Br. 17, 18) and acted as a "group" (Br. 20, 21), to say nothing of the fact that taxpayer reported its taxable income as a partnership (R. 190) and still urges that it is a partnership (Br. 17, 19-20, 28). The contention rests upon the gratuitous assumption (Br. 38, 41) that, because the 14 original Investors signed separate (but admittedly identical) instruments of agreement with the Operator, they cannot be regarded as "associates". Surely the fact that the Investors affixed their signatures to several identical documents, rather than to one document, does not preclude the inference that they "joined in a common enterprise" and "became associated in the enterprise according to the terms of the arrangement". *Helvering v. Combs, supra*, p. 368. Unless sheer form is to prevail over substance, the Tax Court's finding (R. 213-214, 222-223) that the agreement of the parties was contained in the 14 identical instruments of agreement is inescapable. Not only were the instruments identical except for the

names of the subscribing Investors, but it is manifest from their identical provisions that the Investors were jointly investing capital in a common enterprise with a view to sharing its profits. For example, the Operator was to use the sum contributed by each Investor "together with other sums contributed by thirteen other persons, who are also referred to herein as 'Investors' ", to purchase the properties (R. 167); it could sell, hold, or "in any otherwise deal with" the properties as it saw fit without interference by any of the Investors "less than the full number thereof" (R. 168);⁷ and each Investor was entitled to a return of net profits "at the same time, and in equal amounts, as are returned to the other Investors" (R. 168-169). It is immaterial whether, as taxpayer claims (Br. 38), the Investors neither met nor knew each other before entering into the arrangement; granting this be so, it no more prevents treatment of the organization as an association taxable like a corporation than would the fact that stockholders independently subscribe to stock bar taxability of their organization as a conventional corporation. "Undoubtedly the terms of an association may make the taking or acquiring of shares or interests sufficient to constitute participation, and may leave the management, or even control of the enterprise, to designated persons". *Morrissey v. Commissioner, supra*, p. 357. In *Wellston Hills Syndicate Fund v. Commissioner*, 101 F. 2d 924 (C. C. A. 8th),

⁷ Even if the Investors retained no control over the Operator they could be deemed "associates". *Helvering v. Combs, supra*; *Helvering v. Coleman-Gilbert, supra*.

the court stated with respect to the syndicate there involved (p. 927):

Is this an "association" within the revenue statute as that term is defined in the *Morrissey* case, *supra*? Clearly these parties were associated together. The contract brought their money together and defined the rights of the parties. It created a fund, set forth the uses thereof, the party solely entitled to direct usage thereof, the interests of the various parties and the disposition of the fund. Also, this association of individuals was for a business undertaking. The sole inducement for participation was the hope of making money through the acquisition, improvement and sale of a tract of land. Thus the petitioner met the requirements of an association in the respects that it brought together various individuals in a common enterprise for business purposes.

Equally without merit is taxpayer's related contention (Br. 17, 23-26) that the Investors each created a trust of which Thomas was trustee. The parties did not even purport to create a trust, and the Tax Court properly refused to find that they did. (R. 224.) Admittedly (Br. 20) title was taken in Thomas' name for "convenience." As is plain from the agreement (R. 167-168) Thomas was simply a depository of the title; all powers were vested in the Operator. Significantly, no income tax return was filed by Thomas (or for that matter, by the Operator) as a fiduciary, nor by the Investors as trust beneficiaries. On the contrary, taxpayer reported its income as a partnership. (R. 190.) Indeed, we are at a loss to understand tax-

payer's claim that it was a trust in view of its concurrent claim (Br. 17, 19-20, 26, 28) that the Tax Court erred in refusing to find it was a partnership. At any rate, even assuming, *arguendo*, that the organization was a trust, that would in no wise aid taxpayer's position; the venture would nevertheless fall within the category of business trusts taxable as associations. Section 19.3797-3 of Treasury Regulations 103; *Morrissey v. Commissioner*, *supra*; *United States v. Homecrest Tract*, 160 F. 2d 150 (C. C. A. 9th); *Commissioner v. Security-First Nat. Bank*, 148 F. 2d 937 (C. C. A. 9th); *Helm & Smith Syndicate v. Commissioner*, 136 F. 2d 440 (C. C. A. 9th); *Kettleman Hills R. S. No. 1 v. Commissioner*, 116 F. 2d 382 (C. C. A. 9th), certiorari denied, 313 U. S. 582; *Title Insurance & Trust Co. v. Commissioner*, 100 F. 2d 482 (C. C. A. 9th); *Sherman v. Commissioner*, 146 F. 2d 219 (C. C. A. 6th); *National Metropolitan Bank v. Commissioner*, 145 F. 2d 649 (C. C. A. 4th).

Nor is there any basis for taxpayer's contention (Br. 53-62) that the venture was purely a liquidating one, devoid of any profit-seeking business activities. This depends of course on the powers vested in the Operator, and taxpayer may not claim that they were narrower than those set forth in the agreement. *Helvering v. Coleman-Gilbert*, *supra*, p. 374; *Morrissey v. Commissioner*, *supra*, p. 357; *United States v. Homecrest Tract*, *supra*; *Title Insurance & Trust Co. v. Commissioner*, *supra*; *Commissioner v. Security-First Nat. Bank*, *supra*. It is crystal clear from the agreement that taxpayer was formed for the purpose of

engaging in profitable business transactions. The Operator was empowered, among other things, to purchase the properties “for the profitable resale thereof” (R. 167–168); to borrow and reborrow money in financing the purchase (R. 167); to “sell, convey, hold, lease for one season only, or in any otherwise deal with and treat said properties as the sole and absolute owner thereof”, (R. 168); to “incur such costs, expenses, and charges in connection with the acquiring, holding, renting, selling, or protecting of said properties, as it may deem proper” (R. 168); and it was to make distributions to the Investors “whenever there shall be a net amount of \$7,000 or more on hand” (R. 169). Even if only one piece of property were here involved, such broad powers would amply justify treatment of the enterprise as an “association.” *Swanson v. Commissioner, supra*; *Helvering v. Coleman-Gilbert, supra*; *Title Insurance & Trust Co. v. Commissioner, supra*; *Wabash Oil & Gas Ass’n v. Commissioner*, 160 F. 2d 658 (C. C. A. 1st), certiorari denied, June 9, 1947; *Sherman v. Commissioner, supra*; Sections 19.3797–2 and 19.3797–3 of Regulations 103. See also 7A Mertens, Law of Federal Income Taxation, Secs. 43.16, 43.19–43.22. *A fortiori* such conclusion is justified where, as here, the powers relate to 21 separate and widely scattered parcels of real estate, containing over 27,000 acres of diversified properties. Moreover, as the Tax Court noted (R. 222), one of the express purposes of the venture was the “*profitable resale*” of the properties, and there was no time limit within which that purpose was to be

accomplished.⁸ What is more, the properties were purchased subject to outstanding leases which yielded a substantial rental income (R. 216), and costly improvements to the property were made by the Operator (R. 218-219). And quite apart from these considerations, the 15 years (1926-1940) of farming, renting, selling, and other activities in which the Operator actually engaged (R. 217-218), and from which the Investors realized almost 100% profit on their investment (R. 218), may hardly be characterized as a merely liquidating venture. *Morrissey v. Commissioner, supra*; *Commissioner v. Security-First Nat. Bank, supra*; *Title Insurance & Trust Co. v. Commissioner, supra*; *Jackson v. United States*, 110 F. 2d 574 (C. C. A. 9th); *United States v. Trust No. B. I. 35, Etc.*, 107 F. 2d 22 (C. C. A. 9th); *Thrash Lease Trust v. Commissioner*, 99 F. 2d 925 (C. C. A. 9th), certiorari denied, 306 U. S. 564; *Kettleman Hills R. S. No. 1 v. Commissioner*, 116 F. 2d 382 (C. C. A. 9th), certiorari denied, 313 U. S. 582; *United States v. Rayburn*, 91 F. 2d 162 (C. C. A. 8th); *United States v. Hill*, 142 F. 2d 622 (C. C. A. 10th); *Sherman v. Commissioner, supra*. It is immaterial whether, as taxpayer claims (Br. 20-21), the Investors contemplated an *eventual* resale of the properties at a profit; the critical fact remains that the Operator was empowered to hold and deal with the properties indefinitely (R. 168), and did so quite profitably for 15 years (R. 218). It is likewise immaterial whether, as taxpayer claims

⁸ In fact, it was never intended that the city property should be subdivided and the Operator refused to sell this property in units of less than one city block. (R. 216-217.)

(Br. 54-55), the depression interfered with the rapidity in which lots were sold. As the Tax Court pointed out (R. 221), even in prosperous times the subdividing and reselling of the extensive acquisitions here involved could not be carried out quickly, and the record shows that it required 5 years to resell the major portion of the properties even when the real estate market was favorable. As this Court stated in *Title Insurance & Trust Co. v. Commissioner, supra*, p. 485:

Petitioner's contention that the trust was not created or maintained for the purpose of carrying on a business disregards the admitted facts. As disclosed by the trust agreement, its purpose was to carry on the business of owning, managing, leasing and selling real property and sharing the gains therefrom. The fact that there was only one piece of property is unimportant. *Swanson v. Commissioner, supra*, pages 363, 365, 56 S. Ct. 283. So, also, is the fact that, in the taxable year (1933), the trustee's activities were confined to the collection and distribution of rents, payment of taxes, bookkeeping and other incidental duties. The purpose of the trust is found in the instrument which created it. The parties are not at liberty to say that it had a different or narrower purpose.

If more were needed to demonstrate the weakness of taxpayer's argument it is furnished by the fact that it earned a substantial operating profit as late as the taxable year here involved—most of it from leasing operations. It reported rental income of \$48,383.28, and net income of \$31,512.01 (R. 190.) Cf. *United*

States v. Homecrest Tract, supra, p. 152, fn. 6.⁹ To hold, in the face of the record here presented, that taxpayer must as a matter of law be treated as a pure liquidating venture would well nigh render meaningless the statutory mandate that "associations" be classified and taxed as corporations. Certainly the Tax Court applied the correct principles, and its conclusion that the instant organization was an association cannot be said to be without rational basis. Cf. *John Kelley Co. v. Commissioner*, 326 U. S. 521; *Dobson v. Commissioner*, 320 U. S. 489. Even if this were a border-line case the Tax Court's decision should not be disturbed. *Thrash Lease Trust v. Commissioner, supra*.

Taxpayer attempts to draw factual distinctions between this case and some others where the organization was held to be an association (Br. 62-67), and analogies with those where the result was otherwise (Br. 38-45, 53-61). Each case in this field turns, as this Court stated it must (*Thrash Lease Trust v. Commissioner, supra*), on its own facts. The decisions are so numerous, and the situations involved so varied, that only the guiding principles stand out. Suffice to note that none of the cases relied upon by taxpayer is comparable on its facts. *Commissioner v. Gerstle*, 95 F. 2d 587 (C. C. A. 9th), upon which taxpayer chiefly relies (Br. 46-53), can afford it little comfort. This Court there sustained the Tax Court's conclusion that

⁹ Taxpayer's suggestion (Br. 20, 61) that it was not doing business because its business income consisted entirely of capital gains has no basis in fact. And even if true, it would have no relevancy. Cf. *Sherman v. Commissioner, supra*, pp. 227-228.

a syndicate was not an "association" since, as the Tax Court had found, (1) the arrangement lacked two of the characteristic advantages of a corporation, namely, limited liability of the participants and ready transferability of their interests (p. 589); and (2) the participants acquired equitable ownership of the syndicate property, not merely personal claims against the syndicate managers (p. 590). The Gerstle syndicate was distinguished by this Court in *Helm & Smith Syndicate v. Commissioner, supra* (p. 441), and again in *United States v. Homecrest Tract, supra* (p. 153, fn. 7), on the additional ground that it lacked a centralized management. These features serve also to distinguish the *Gerstle* case from the one at hand. As the Tax Court took pains to point out (R. 225-226), the venture here under scrutiny possessed all the salient attributes of a corporation with the possible exception of the limited liability feature, whose absence is not decisive.¹⁰ Furthermore, as is plain from the instant agreement and as the Tax Court observed (R. 224-225), the Investors here did not become co-owners, as did the members of the Gerstle syndicate, but acquired personal claims against the Operator; they had only the right to receive "moneys remaining in the Operator's hands" (R. 169).¹¹ If any comparison with other cases is to be made, we submit that the organization here involved bears far less resemblance to the Gerstle

¹⁰ See footnote 5, *supra*.

¹¹ Even if the Investors had been co-owners, that would not preclude a holding that the organization was an association, rather than a trust or a partnership. See *Helvering v. Coleman-Gilbert, supra*, p. 374.

syndicate than to those which were held to be taxable as "associations" in *Wabash Oil & Gas Ass'n v. Commissioner, supra*, and *Wellston Hills Syndicate Fund v. Commissioner, supra*. See also *Kilgallon v. Commissioner*, 96 F. 2d 337 (C. C. A. 7th), certiorari denied, 305 U. S. 622, and *United States v. Rayburn*, 91 F. 2d 162 (C. C. A. 8th).

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted.

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OCTOBER, 1947.

APPENDIX

Internal Revenue Code:

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(2) *Partnership and Partner*.—The term “partnership” includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term “partner” includes a member in such a syndicate, group, pool, joint venture, or organization.

(3) *Corporation*.—The term “corporation” includes associations, joint-stock companies, and insurance companies.

* * * * *

(26 U. S. C. 1940 ed., Sec. 3797.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.3797-1. *Classification of taxables*.—

For the purpose of taxation the Internal Revenue Code makes its own classification and prescribes its own standards of classification. Local law is of no importance in this connection. Thus, a trust may be classed as a trust or as an association (and, therefore, as a corporation), depending upon its nature or its activities. (See section 19.3797-3.) The term “partnership” is not limited to the common law meaning of partnership, but is broader in its scope and includes groups not commonly called

partnerships. (See section 3797-4.) The term "corporation" is not limited to the artificial entity usually known as a corporation, but includes also an association, a trust classed as an association because of its nature or its activities, a joint-stock company, an insurance company, and certain kinds of partnerships. (See sections 19.3797-2 and 19.3797-4.) The definitions, terms, and classifications, as set forth in section 3797, shall have the same respective meaning and scope in these regulations.

SEC. 19.3797-2. *Association.*—The term "association" is not used in the Internal Revenue Code in any narrow or technical sense. It includes any organization, created for the transaction of designated affairs, or the attainment of some object, which, like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity. It is immaterial whether such organization is created by an agreement, a declaration of trust, a statute, or otherwise. It includes a voluntary association, a joint-stock association or company, a "business" trust, a "Massachusetts" trust, a "common law" trust, an "investment" trust (whether of the fixed or the management type), an interinsurance exchange operating through an attorney in fact, a partnership association, and any other type of organization (by whatever name known) which is not, within the meaning of the Code, a trust or an estate, or a partnership. If the conduct of the affairs of a corporation continues after the expiration of its charter, or the termination of its existence, it becomes an association.

SEC. 19.3797-3. *Association distinguished from trust.*—The term "trust," as used in the Internal Revenue Code, refers to an ordinary trust, namely, one created by will or by declara-

tion of the trustees or the grantor, the trustees of which take title to the property for the purpose of protecting or conserving it as customarily required under the ordinary rules applied in chancery and probate courts. The beneficiaries of such a trust generally do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. Even though the beneficiaries do create such a trust, it is ordinarily done to conserve the trust property without undertaking any activity not strictly necessary to the attainment of that object.

As distinguished from the ordinary trust described in the preceding paragraph there is an arrangement whereby the legal title to the property is conveyed to trustees (or a trustee) who, under a declaration or agreement of trust, hold and manage the property with a view to income or profit for the benefit of beneficiaries. Such an arrangement is designed (whether expressly or otherwise) to afford a medium whereby an income or profit-seeking activity may be carried on through a substitute for an organization such as a voluntary association or a joint-stock company or a corporation, thus obtaining the advantages of those forms of organization without their disadvantages. The nature and purpose of a cooperative undertaking will differentiate it from an ordinary trust. The purpose will not be considered narrower than that which is formally set forth in the instrument under which the activities of the trust are conducted.

It a trust is an undertaking or arrangement conducted for income or profit, the capital or property of the trust being supplied by the beneficiaries, and if the trustees or other designated persons are, in effect, the managers of the undertaking or arrangement, whether the beneficiaries do or do not appoint or control them, the beneficiaries are to be treated as voluntarily

joining or cooperating with each other in the trust, just as do members of an association, and the undertaking or arrangement is deemed to be an association classified by the Internal Revenue Code as a corporation. However, the fact that the capital or property of the trust is not supplied by the beneficiaries is not sufficient reason in itself for classifying the arrangement as an ordinary trust rather than as an association.

By means of such a trust the disadvantages of an ordinary partnership are avoided, and the trust form affords the advantages of unity of management and continuity of existence which are characteristic of both associations and corporations. This trust form also affords the advantages of capacity, as a unit, to acquire, hold, and dispose of property and the ability to sue and be sued by strangers or members, which are characteristic of a corporation; and also frequently affords the limitation of liability and other advantages characteristic of a corporation. These advantages which the trust form provides are frequently referred to as resemblance to the general form, mode of procedure, or effectiveness in action, of an association or a corporation, or as "quasi-corporate form." The effectiveness in action in the case of a trust or of a corporation does not depend upon technical arrangements or devices such as the appointment or election of a president, secretary, treasurer, or other "officer," the use of a "seal," the issuance of certificates to the beneficiaries, the holding of meetings by managers or beneficiaries, the use of a "charter" or "by-laws," the existence of "control" by the beneficiaries over the affairs of the organization, or upon other minor elements. They serve to emphasize the fact that an organization possessing them should be treated as a corporation, but they are not essential to such classification, for the fundamental benefits enjoyed by a corporation, as

outlined above, are attained, in the case of a trust, by the use of the trust form *itself*. The Internal Revenue Code disregards the technical distinction between a trust agreement (or declaration) and ordinary articles of association or a corporate charter, and all other differences of detail. It treats such a trust according to its essential nature, namely, as an association. This is true whether the beneficiaries form the trust or, by purchase or otherwise, acquire an interest in an existing trust.

The mere size or amount of capital invested in the trust is of no importance. Sometimes the activity of the trust is a small venture or enterprise, such as the division and sale of a parcel of land, the erection of a building, or the care and rental of an office building or apartment house; sometimes the activity is a trade or business on a much larger scale. The distinction is that between the activity or purpose for which an ordinary trust of the traditional type would be created, and the activity or purpose for which a corporation for profit might have been formed.

SEC. 19.3797-4. *Partnerships*.—The Internal Revenue Code provides its own concept of a partnership. Under the term “partnership” it includes not only a partnership as known at common law but, as well, a syndicate, group, pool, joint venture, or other unincorporated organization which carries on any business, financial operation, or venture, and which is not, within the meaning of the Code, a trust, estate, or a corporation. On the other hand the Code classifies under the term “corporation” an association or joint-stock company, the members of which may be subject to the personal liability of partners. If an organization is not interrupted by the death of a member or by a change in ownership of a participating interest during the agreed period of its existence, and its management is centralized in one or more persons in

their representative capacities, such an organization is an association, taxable as a corporation. As to the characteristics of an association, see also sections 19.3797-2 and 19.3797-3. The following examples will illustrate some phases of these distinctions:

(1) If A and B buy some acreage for the purpose of subdivision, they are joint adventurers, and the joint venture is classified by the Code as a partnership.

(2) A, B, and C contribute \$10,000 each for the purpose of buying and selling real estate. If A, B, C, or D, an outside party (or any combination of them as long as the approval of each participant is not required for syndicate action), takes control of the money, property and business of the enterprise, and the syndicate is not terminated on the death of any of the participants, the syndicate is classified as an association.

SEC. 19.3797-5. *Limited partnerships.* — A limited partnership is classified for the purpose of the Internal Revenue Code as an ordinary partnership, or, on the other hand, as an association taxable as a corporation, depending upon its character in certain material respects. If the organization is not interrupted by the death of a general partner or by a change in the ownership of his participating interest, and if the management of its affairs is centralized in one or more persons acting in a representative capacity, it is taxable as a corporation. For want of these essential characteristics, a limited partnership is to be considered as an ordinary partnership notwithstanding other characteristics conferred upon it by local law.

The Uniform Limited Partnership Act has been adopted in several States. A limited partnership organized under the provisions of that Act may be either an association or a partnership depending upon whether or not in the particular case the essential characteristics of an association exist.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BLOOMFIELD RANCH, by JAMES A. CLAYTON & Co.,
a corporation, managing partner, operator and co-
owner thereof, and by FLORENCE G. BALDWIN,
JOHN DERROL CHACE, WILLIS SHERMAN CLAYTON,
JR., ARTHUR D. CURTNER, JOHN KIRK DORRANCE,
ROSE L. FITCH, MARGARET F. COYKENDALL, HUGH
S. HERSMAN, ALFRED A. HAPGOOD, GEORGE H.
OSEN, ALFRED L. PARKINSON, ESTATE OF ANDREW
R. PATRICK, deceased, by SIGURD C. P. CORNETT,
as executor of the will of Andrew R. Patriek,
deceased, SAN JOSE HARDWARE Co., a corporation,
NELLIE SHILLINGSBURG, ANNE THOMPSON, SARAH
SHILLINGSBURG BARRY, MARGARET LEAMAN, and
ESTATE OF ELLEN WEINSTEIN, deceased, by WELLS
FARGO BANK & UNION TRUST Co., executor, sub-
stituted for Estate of Samuel Weinstein, deceased,
by Ellen Weinstein, as executrix of the will of
Samuel Weinstein, deceased, partners in and co-
owners of Bloomfield Ranch,

Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

On Petition for Review of Decision of the Tax Court
of the United States.

REPLY BRIEF FOR PETITIONERS.

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No. 11,643

IN THE

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BLOOMFIELD RANCH, by JAMES A. CLAYTON & Co.,
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owners of Bloomfield Ranch,

Petitioners on Review,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

**On Petition for Review of Decision of the Tax Court
of the United States.**

REPLY BRIEF FOR PETITIONERS.

In our opening brief we showed: That the title to the property that was acquired by the Investors was taken in the name of Thomas in whom a resulting trust arose leaving the equitable title in the Investors as tenants in common. That the Investors appointed Clayton as their agent to sell the property. That there being no intervening entity having any interest in the property, all moneys that were received from sales belonged directly to the Investors. That the Investors never organized in any way. That there was no semblance of an organization, consequently no resemblance to a corporation. That this case is governed by the *Gerstle* case (95 Fed. (2d) 587), from all of which it follows that the decision of the Tax Court must be reversed.

Respondent has not answered our opening brief.

We there showed conclusively that Thomas held the title in trust for the respective Investors, a resulting trust, not an express or an active trust, and that the Tax Court erred in holding that the titles were not held by Thomas in trust. (Our brief, page 23.) Respondent has made no attempt to answer that argument.

We further showed in our brief that since Thomas held only the naked, legal title, each Investor had a separate, equitable estate in the land, title to which was taken in the name of Thomas, with the result that the Investors were tenants in common, the equitable title to the land being real property. (Our brief, pages 24-29.) Respondent's only reply is, on page 23 of its brief, the bald assertion "* * * Inves-

tors here did not become co-owners as did members of the Gerstle Syndicate [95 Fed. (2d) 587] but acquired personal claims against the Operator; they had only the right to receive 'moneys remaining in the Operator's hands.' " That statement is directly contrary to the law and the facts as our brief shows, pages 26-29.

Respondent, on page 9 of its brief, refers to "Taxpayer's contention that it was merely a liquidating trust * * *", and elsewhere, pages 17, 18, refers to Taxpayer's claim that it was a trust. We made no such contention. Our brief does not anywhere refer to the transaction as one of liquidation, or as a trust of any kind other than a naked resulting trust, not an express trust, not an active trust, not the kind of trust that is taxable as a corporation.

We stated our position clearly on page 18 of our brief, as follows:

"We contend that the petitioners were joint venturers, owners of undivided, equitable interests in real property, which they bought and placed in the name of Thomas. They were tenants in common and each individually and separately appointed Clayton his or her agent to sell his property, with such powers as were necessary to that end."

Respondent does not deny that Clayton was agent of the respective Investors. His brief mentions some of the agent's powers on page 19, but significantly omits, as did the Tax Court, in its opinion, the limitation on the powers of the agent.

“But may not exchange, encumber, nor lease except as above specified, nor sell trees, wood or improvements off from said property without the consent of the Investors.”

Another limitation of the purpose of the enterprise is stated in the agreements (Record, pages 167, 168):

“The Operator is to take and hold title to said properties originally in the name of M. E. Thomas;
* * * for the profitable resale thereof.”

Because it could not, respondent has not pointed to any entity (such as a corporation would be) that held the real title (as distinguished from the shadow title) apart from the Investors. We showed in our brief, page 24, that the legal estate held by Thomas was nothing more than the “shadow” following the equitable estate held by the Investors. And we said, on page 32, “Thomas was merely a conduit of the title”. Respondent evidently agrees with us, for he says, page 17 of respondent’s brief, “Thomas was simply a depository of the title; all powers were vested in the Operator”. We showed, on pages 31-35 the limitations on the powers of the Operator.

Respondent says the taxpayer was organized for business purposes “by a group of Investors who jointly contributed capital to the enterprise and received the profits in proportion to their participating interests”. There is not a line of evidence in the record that shows that the Investors were organized in any way, shape or form. The only inter-relationship between the Investors was the fact they each bought

undivided interests in the land. It is noteworthy that counsel has made no attempt to reply to our showing that, under the law of California, Thomas held the title in trust for each Investor separately. Consequently respondent's statement that the Investors did not become co-owners as did the members of the Gerstle Syndicate, but acquired personal claims against the Operator, results from plain disregard of the law. Counsel says, page 13, that the organization was created by "an agreement between the Operator, Clayton & Co., and fourteen Investors". We have pointed out in our brief that each Investor made a separate agreement individually with Clayton. There was no concert of action between the Investors, some of whom were not acquainted with the others.

The Court for the Fifth Circuit in *Commissioner v. Whitcomb*, 95 Fed. (2d) 596, in pointing out the difference between a group and an association, said, page 598:

"An association which can be taxed as a corporation is organized with more permanency. It owns its property. Its managers are its agents. Its profits and losses are conceived of as its own, the associates as having ownership only in what may finally be distributed to them. A joint adventure is not such. In the Revenue Act of 1932, Section 1111 (a) (3) * * * syndicates and pools are expressly mentioned, and classed not as associations taxable as corporations, but with partnerships in which each individual pays his own tax."

The Revenue Act of 1932, in the respect quoted, has not been changed. It is interesting to note, in this connection, that respondent makes no attempt to distinguish *C. H. Cloris*, 32 B.T.A. 646, cited and quoted on pages 39 and 40 of our brief; *Commissioner v. Rector & Davidson*, C.C.A. 5, 1940, 111 Fed. (2d) 332, cited and quoted on pages 40 and 41 of our brief; *McKean v. Scofield*, C.C.A. 5, 1940, 108 Fed. (2d) 764, cited and quoted on pages 41 and 42 of our brief; and *C. A. Everts, et al. v. Commissioner*, 38 B.T.A. 1039, cited and quoted on pages 42 and 43 of our brief; all showing that there must be an organization if it is to result in an association. That the Investors had interests in the same properties certainly falls far short of making an *organization* of the Investors, as is shown by the authorities just referred to. It goes no further than making them tenants in common, which is exactly the situation that existed in the *Gerstle* case. Indeed our friends on the other side try to distinguish the *Gerstle* case from the case at bar (their brief page 23) on the ground (among others) that there the participants had equitable interests in the land.

The importance to respondent of establishing the existence of an organization among the Investors is evidenced by the frequent use of the word "organization" in its brief, where it appears more than a dozen times. We think that we have covered the subject of "organization" in our opening brief, pages 18-20. There was no organization here. Moreover, if there were an organization there is still lacking resemblance to a corporation.

The suggestion that the interests of the original Investors were transferable adds nothing to the argument, because the interests of the Investors were transferable as soon as they were purchased, and were not made so by any agreement that was made, being vested interests in real property, which must vest somewhere after the death of an owner. That happens under any of the groups defined as "partnerships". Ready transferability, like that of corporate shares, was not a characteristic of the interests of the petitioners.

Wellston Hills Syndicate Fund v. Commissioner, 101 Fed. (2d) 924, C.C.A. 8, cited by respondent, presents no new guiding principle; there all the parties signed one agreement, the title was in a corporation and distributions were made at its discretion contrary to the situation here. Besides, the form of the organization (for there was one there) was very similar to that of a business corporation. The Court thought the characteristics fitted like a glove (page 927).

Respondent has referred here and there to income received by the Investors. The Tax Court found that the reasons for renting and cultivating the acreage pending sales were two-fold; to carry the taxes on the property and to keep the property from going "native", i.e., becoming overgrown with weeds and brush. (R. page 217.) Also, that during the ten years, from 1930 to 1940, the only sales were sales of 60 acres for rights-of-way for public services, and but for such sales no sales would have been made in most of the years. (R. page 217.) The Investors paid income taxes

on whatever they received, and they think, particularly in view of the fact that they reported their income for years as advised by the Collector (though of course there is no estoppel), that they should not be taxed again. We submit that the *Gerstle* case is conclusive.

The decision of the Tax Court should be reversed.

Dated, San Francisco,

October 24, 1947.

Respectfully submitted,

O. K. CUSHING,

EUSTACE CULLINAN,

DELGER TROWBRIDGE,

Attorneys for Petitioners.

No. 11,643

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BLOOMFIELD RANCH, by JAMES A. CLAYTON & Co., a corporation, managing partner, operator and co-owner thereof, and by FLORENCE G. BALDWIN, JOHN DERROL CHACE, WILLIS SHERMAN CLAYTON, JR., ARTHUR D. CURTNER, JOHN KIRK DORRANCE, ROSE L. FITCH, MARGARET F. COYKENDALL, HUGH S. HERSMAN, ALFRED A. HAPGOOD, GEORGE H. OSEN, ALFRED L. PARKINSON, ESTATE OF ANDREW R. PATRICK, deceased, by SIGURD C. P. CORNETT, as executor of the will of Andrew R. Patrick, deceased, SAN JOSE HARDWARE Co., a corporation, NELLIE SHILLINGSBURG, ANNE THOMPSON, SARAH SHILLINGSBURG BARRY, MARGARET LEAMAN, and ESTATE OF ELLEN WEINSTEIN, deceased, by WELLS FARGO BANK & UNION TRUST Co., executor, substituted for Estate of Samuel Weinstein, deceased, by Ellen Weinstein, as executrix of the will of Samuel Weinstein, deceased, partners in and co-owners of Bloomfield Ranch,

Petitioners on Review,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

On Petition for Review of Decision of the Tax Court
of the United States.

PETITIONERS' PETITION FOR A REHEARING.

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Petitioners on Review,

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COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

On Petition for Review of Decision of the Tax Court
of the United States.

PETITIONERS' PETITION FOR A REHEARING.

To the Honorable Francis A. Garrecht, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petitioners in the above-entitled case respectfully petition for a rehearing upon the following grounds:

1. The Court has determined, as we understand the opinion, that the taxpayers constituted a code association taxable as a corporation and were not a code partnership by applying as the determinative test lack or existence of intentional joint activity or endeavor. The decision rests on the application of that test to the facts of this case. This test, it seems to us, is not recognized by statutes, decisions or regulations and is contrary to Internal Revenue Code, Sections 3797(a)(2) and (3), and the regulations issued pursuant thereto. Furthermore, this test is in conflict with the applicable decisions of the Supreme Court and of the Circuit Courts of Appeals in other circuits. Among such decisions we cite:

Morrissey v. Commissioner, 296 U. S. 344;

Commissioner v. Rector & Davidson, C.C.A. 5, 111 Fed. (2d) 332;

Burnet v. Burns, C.C.A. 8, 63 Fed. (2d) 313;

Commissioner v. Whitcomb, C.C.A. 5, 95 Fed. (2d) 596;

Lewis & Co. v. Commissioner, 301 U. S. 385.

The test of an association taxable as a corporation as laid down in the *Morrissey* case is not lack or existence of intentional joint activity or endeavor but

rather whether the parties involved are engaged (1) in carrying on business, and, if so, (2) in the form and manner of a corporation. The application of the test laid down by the Court here, it seems to us, is a denial of the test laid down in the *Morrissey* case.

2. The Court holds that there was no joint activity on the part of the Bloomfield taxpayers but that a partnership or joint venture implies an association and entering into a joint enterprise. The Court says further that a partnership or joint venture conceives the intentional combination and joint endeavor of the parties interested in the common enterprise for their mutual benefit, and not merely the appearance of combination or collective action by accident. After distinguishing between a joint venture and a partnership (a joint venture is a form of partnership under the code definition) the Court adds that the element of collective and conjunctive action for the mutual benefit of all engaged therein is necessary in both a partnership and a joint venture; that is in those two forms of code *partnership*.

On this ground the Court holds that the taxpayers here did not constitute a code partnership.

In explaining this position the Court says: "We do not think that the federal courts in decisions involving the identity of an organization as a partnership under the Internal Revenue Code have willfully ignored or denied the basic concepts of a partnership under general principles of law." That, as we understand the opinion, is to say that a code partnership must have

the characteristic elements of a common law partnership.

Lack or existence of intentional joint activity or endeavor is not a test of *distinction between* code partnerships and code corporations or associations because there can be code partnerships with or without such joint activity or endeavor but there cannot be a code association or corporation without it. The Attorney General in his brief in this case based his position on the contention that the taxpayers "joined in a common enterprise" (p. 15) and were "jointly investing capital in a common enterprise with a view to sharing its profits." (p. 16.) Otherwise he would have been compelled to concede that the taxpayers were not an association taxable as a corporation. The effect of the Court's opinion is to negative that contention of the Attorney General, for he evidently has in mind *intentional* participation in a joint enterprise. The Bloomfield taxpayers *intended* to do what they did. If what they did makes them an association of any kind, it was an association intended by them. If it was not, then they cannot be taxed as an association or code corporation.

The Court quotes the *Morrissey* case (296 U. S. 344) to the effect that an association has been defined "to imply associates and entering into a joint enterprise". The Supreme Court's reference to an association in that quotation is not to a partnership or joint venture but to a code association taxable as a corporation—"the statutory concept of 'association' " as the Court there says. No distinction between in-

tentional joint action and “the appearance of combination or collective action by accident” is made by the *Morrissey* case decision. There must be some form of joint action to constitute either a code partnership or a code association taxable as a corporation. If there was in the Bloomfield case no joint activity (and this is what the Court here holds), then there was no association acting under the semblance of a corporation and therefore no association taxable as such.

In short the ground on which the Court bases its holding that Bloomfield Ranch was not a code partnership forbids the conclusion that it was a code association or corporation, and indicates a conclusion that it was merely a group of individuals acting through a common agent, which was precisely the position which the taxpayers here have taken. Such a group is within the *code definition* of partnership, but not within the code definition of corporation or association doing business in the way of a corporation. The joint action in the Bloomfield enterprise is that all the investors, being co-tenants, chose the same agent.

The *Tower* case (327 U. S. 280-286) on which this Court relies to support the distinction made does not deal with the difference between a code “association” and a code “partnership”. Tower and his wife claimed that they were ordinary or common law partners and that, as such, each was required to report only his distributive share of the ordinary net income of the partnership. The Commissioner contended *not* that

they constituted a corporation or association, but that Tower as an *individual* was the owner and operator of the business and that the wife was not a partner at all, and that her alleged membership was a sham, so that the entire income was taxable to Tower alone. The language from the *Tower* case quoted in the opinion in this Bloomfield case defined and was concerned with a common law partnership solely, and is not authority for the precept that the element of collective and conjunctive action, intentional or otherwise, for the mutual benefit of all engaged therein is necessary in a *code* partnership. Nor does it tend to sustain a conclusion that intentional collective and conjunctive action is an essential element of a code partnership but not of a code association taxable as a corporation. We are aware of no authority, and none is cited in the opinion, holding that the presence or absence of "intentional joint action and combination of effort in the undertaking" is a mark of the *difference between* a code partnership and a code association or corporation.

We do not find in reading the opinion in the *Gerstle* case that the Court there stressed (as the opinion here says it did) the importance of intentional joint action and combination of effort or even mentioned such as a reason for holding the Gerstle syndicates to be code partnerships. The excerpts from the *Gerstle* case quoted in that connection are nothing more than a recital of fact showing what was done by the syndicate members in that case. The Court there pointed out that, while title was not taken in the syndicate

managers, continuity of the enterprise and centralized management existed “*notwithstanding* in practice there was general consultation before important decisions were reached.” The decision was based on the lack of certain characteristic advantages of corporate organization there mentioned and specifically listed in taxpayer’s opening brief in the Bloomfield case at pages 46 to 53.

3. The Court, it seems to us, has not given sufficient heed to the difference between the definition of a partnership recognized prior to the change by the 1932 Revenue Act and the changed definition which provided its own concept of partnership and discarded common law tests. Prior to the 1932 Act the term “partnership” was held to mean a partnership under general law. As a result, syndicates, groups, pools, joint ventures and similar organizations were not required to file income tax returns. The 1932 Act included these organizations within the meaning of partnership. In pointing out the confusion which theretofore existed with respect to such returns the Ways and Means Committee of the House of Representatives in its report on the 1932 Revenue Act (72nd Congress, First Session, House Report 708 at page 53) stated:

“The Bill does away with this uncertainty by placing all joint ventures, syndicates, pools and similar organizations which do not constitute associations or trusts, in the category of partnerships, and the members of such syndicates, pools, etc., in the category of partners. This provision

will have the effect of requiring the syndicate to file an information return similar to the return of a partnership and will thus make it easier for the members to determine the distributive shares in the syndicate gains and losses which are to be included in their own returns.”

It is obvious, therefore, that the purpose of this change in the definition of partnership (first enacted in the 1932 Revenue Act and continued from that time into the Internal Revenue Code) was to treat as partnerships business organizations which in fact were not partnerships under general law. In fact, a reading of the Internal Revenue Code, Section 3797(a)(2) shows that the term “partnership” is used to include all business organizations, which are not, within the meaning of the code, a trust, estate or corporation. The Court in its opinion here seems to say that because Bloomfield Ranch lacks an element of a true partnership it must be an association taxable as a corporation. This, we respectfully suggest, is clearly erroneous. The code provides that an organization which is not a trust, estate or corporation is a partnership. We demonstrated in our briefs that Bloomfield Ranch lacked the elements of a corporation or of an association. This Court found Bloomfield Ranch lacked the essential element of an association, namely, joint activity. Therefore it must follow that Bloomfield Ranch is classified as a partnership under the Internal Revenue Code, that is as a group, syndicate, pool, or joint venture, since Bloomfield Ranch cannot be classified as a trust, estate, or corporation.

4. The Court says that it has considered the lack of interrelation between the taxpayers here and has noted it as an element of dissimilarity between this and the *Gerstle* case, but, as we have indicated, this element of dissimilarity is a distinction without a difference.

The application by the Court in this case to the Bloomfield taxpayers of the five standards or tests to characterize a code corporation listed in the *Morrissey* case will fit the *Gerstle* case just as aptly. In the taxpayers' opening brief (pages 46 to 53) we listed the points of *analogy* between the Bloomfield case and the *Gerstle* case and we shall not repeat them here, but the Court's opinion here mentions no point of *difference* except lack of interrelation between the taxpayers in the Bloomfield case.

5. The opinion holds that the acts of Clayton & Co. were not performed as an agent. It does not suggest the capacity in which Clayton & Co. did perform those acts or could have performed them if not as agent. To say as the opinion does that "the operator, no doubt, was *in a sense* the representative of the Investors in carrying on the plan" seems to us inconsistent with the statement that it was not an agent. Manifestly Clayton & Co. was not a trustee, since it did not hold the title. The fact that the Operator, as the opinion says, "could and did act independently of the Investors pursuant to the needs of the moment and its acts in that respect were beyond their control" does not make the operator any more or less than an agent with plenary authority, but still an agent.

6. The Court held that Investors “were not given any undivided interest in the realty”. We respectfully submit that under the law of California, which law must govern this question, the Investors, by operation of law, acquired undivided interests in the realty at the time of its purchase by Clayton & Co. on their behalf. There was no need for any one to give to the Investors, nor for the Operator or for Thomas to convey to them, any interest in the property. Their interest vested at the time of the conveyance from Miller & Lux to Thomas. See our opening brief, pages 23 to 26. For that reason, we submit, the Court has decided an important question of local law in a way in conflict with applicable state decisions.

The Investors were the owners of an undivided interest in realty as tenants in common. Each of them appointed Clayton & Co. to be his agent with respect to his interest in that property. Since there was no other joint activity on their part (and the Court here so found) they could not constitute a code association or corporation since under the Internal Revenue Code they were not a trust, not an estate, not a corporation, and under Section 3797(a)(2) they did constitute a partnership; that is, a group, syndicate, pool or joint venture.

Not only in the *Gerstle* case but in the following cases cited and quoted in our opening brief co-tenants of real property who had transferred the bare legal title to a trustee for convenience and who conducted the enterprise acting through a common agent (as in this case and the *Gerstle* case) were said to con-

stitute a joint venture or code partnership and not a trust or estate or a corporation.

Commissioner v. Rector & Davidson (C.C.A. 5, 1940), 111 F. (2d) 332;

C. A. Everts, et al., v. Commissioner (1938), 38 B.T.A. 1039;

C. H. Clovis (1935), 32 B.T.A. 646;

Stantex Petroleum Co., Trustee (1938), 38 B.T.A. 269.

While in *Lewis v. Commissioner* (1937), 301 U. S. 385, there was only one owner, the principle and language of the opinion are applicable here.

The circumstances that in some of those cases the Investors signed an agreement with one another as well as with the common agent whereas the Bloomfield Investors severally signed an agreement only with the agent is an element of strength (not, as the Court's opinion suggests, of weakness) in our contention that the Bloomfield Investors were not a code association or corporation because here there was no joint agreement but only appointment of a common agent and nothing analogous to a corporate board of directors directing the agent.

Dated, San Francisco,
May 20, 1948.

O. K. CUSHING,
DELGER TROWBRIDGE,
EUSTACE CULLINAN,
Attorneys for Petitioners.

CERTIFICATE OF COUNSEL.

The undersigned counsel for petitioners hereby certify that in their judgment the foregoing petition for a rehearing is well founded and that it is not interposed for delay.

Dated, San Francisco,
May 20, 1948.

O. K. CUSHING,
DELGER TROWBRIDGE,
EUSTACE CULLINAN,
Counsel for Petitioners.

